16)

No. 84-822-CFX
Status: GRANTED

Title: American National Bank and Trust Company of Chicago, et al., Petitioners
v.
Haroco, Inc., et al.

Docketed:
November 21, 1984

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Egan, Donald E.

Counsel for respondent: Hartunian, Aram A.

Entry	Date	Note	Proceedings and Orders
1	Nov 21 1984	G	Petition for writ of certiorari filed.
2	Nov 23 1984		Brief of respondents Haroco, Inc., et al. in opposition filed.
3	Nov 23 1984	N	Motion of the parties to expedite consideration of the petition for a writ of certiorari filed.
4	Dec 5 1984		DISTRIBUTED. January 4, 1985
5	Dec 21 1984	X	Brief amicus curiae of American Bankers Assn. filed.
7	Jan 7 1985		REDISTRIBUTED. January 11, 1985
8	Jan 14 1985		Petition GRANTED. The case is set for oral argument in tandem with No. 84-648, Sedima, S.P.R.L. v. Imrex Company. Justice Powell OUT.
			**********
9	Jan 25 1985		Application of the Attorney General of Arizona for leave to file a single consolidated amicus curiae brief, not
10	Jan 25 1985		to exceed 50 pages, filed.
11	Feb 1 1985		DISTRIBUTED. Feb. 15, 1985. (Above application).
12	Feb 19 1985		Record filed.
13	Feb 19 1985		Certified copy of original record on appeal and C. A. proceedings received.
14	Feb 19 1985		The application of the Attorney General of Arizona for leave to file a consolidated brief a amicus curiae in
15	Feb 19 1985		excess of page limitation presented to Marshall, J., and by him referred to the Court denied. Powell, J., OUT.
16	Feb 25 1985	G	Motion of American Bankers Association for leave to file a brief as amicus curiae filed.
17	Feb 28 1985		Brief of petitioners Am. Natl. Bank, et al. filed.
18	Feb 26 1985		Brief amicus curiae of Suffolk, NY filed. VIDED.
19	Mar 12 1985	G	Motion of petitioners to dispense with printing the joint appendix filed.
20	Mar 18 1985		Motion of American Bankers Association for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
21	Mar 15 1985		SET FOR ARGUMENT. Wednesday, April 17, 1985. (3rd case).
22	Mar 25 1985		Motion of petitioners to dispense with printing the joint appendix GRANTED. Justice Powell OUT.
23	Mar 22 1985		CIRCULATED.
24	Mar 29 1985	G	Motion of Interinsurance Exchange of the Automobile Club of Southern California for leave to file a brief as amicus curiae filed.
25	Mar 29 1985	X	Brief amicus curiae of Arizona, et al. filed.
26	Mar 29 1985	G	Motion of John Grado, et al. for leave to file a brief as amici curiae filed.

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App

No. 84-822-CFX

Entry	Date	Note	Proceedings and Orders
27	Apr 2 1985	X	Brief of respondents Haroco, Inc., et al. filed.
28	Mar 29 1985	X	Brief amicus curiae of Chicago, et al. filed.
29	Apr 3 1985		Opposition of Am. Natl. Bank, et al. to motion of Interinsurance Exchange of the Automobile Club of So.CA for leave to file a brief as amicus curiae filed.
30	Apr 3 1985		Opposition of Am. Natl. Bank, et al. to motion of John Grado, et al. for leave to file a brief as amici curiae filed.
31	Apr 3 1985		Application for leave to file a reply brief on the merits in excess of the page limitations filed (A-749),
32	Apr 3 1985		and order granting same by Stevens, J., on April 3, 1985. The brief may not exceed 30 pages.
33	Apr 29 1985	X	Brief amicus curiae of New York filed.
34	Apr 10 1985	X	Reply brief of petitioners Am. Natl. Bank, et al. filed.
35	Apr 15 1985		Motion of Interinsurance Exchange of the Automobile Club of Southern California for leave to file a brief as amicus curiae GRANTED.
36	Apr 15 1985		Motion of John Grado, et al. for leave to file a brief as amici curiae GRANTED.
37	Apr 17 1985		ARGUED.
38	Apr 22 1985	G	Motion of petitioners to supplement the record filed.
39	Apr 29 1985		Motion of petitioners to supplement the record GRANTED.

84-822

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a civil claim for treble damages under the Racketeer Influenced And Corrupt Organizations Act ("RICO") requires that the plaintiff suffer damages by reason of the defendant acquiring, maintaining control or an interest in, or conducting the affairs of an "enterprise" through the commission of statutorily prescribed offenses as opposed to being damaged solely by reason of the defendant's commission of such offenses.

PARTIES TO THE ACTION

Petitioners are American National Bank And Trust Company of Chicago, Walter E. Heller International Corporation, now known as Amerifin Corporation, and Ronald J. Grayheck. Petitioners' corporate parents, subsidiaries and affiliates are contained in the Appendix pursuant to Rule 28.1 of Rules of the Supreme Court of the United States (App. A-82). Respondents are Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co. Their corporate parents, subsidiaries and affiliates are unknown to Petitioners.

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No.

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OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, American National Bank And Trust Company Of Chicago, Walter E. Heller International Corporation and Ronald J. Grayheck, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered October 19, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported but is contained in the Appendix (App. A-1). The opinion of the District Court for the Northern District of Illinois is reported at 577 F. Supp. 111 (N.D. Ill. 1983).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 19, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Racketeer Influenced And Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§1961-1968 are contained in the Appendix (App. A-43 to A-56).

STATEMENT OF THE CASE

Respondents filed this action in March of 1983 alleging that ANB, Walter E. Heller International Corporation ("Heiler"), ANB's corporate parent, and Ronald J. Grayheck ("Grayheck"), an officer and director of ANB, defrauded them and other members of the class they purported to represent by charging excessive interest rates due to their improper calculation of ANB's prime rate. The only federal claims were based on alleged violations of Section 1962(c) of RICO.[1] Specifically, Respondents asserted RICO claims under two alternative theories: (1) ANB violated RICO by using the mail for the delivery and receipt of notices of changes in interest rates and payments of interest by borrowers; and (2) Heller and Grayheck violated RICO through the use of the mail in the same manner.[2] They sought "treble damages suffered by reason of the excessive interest paid by plaintiffs and the class members to ANB." (App. A-64)

On Petitioners' motion the district court dismissed the action on July 28, 1983 for failure to state a claim, holding that the RICO claims were fatally defective because "the only injuries the plaintiffs allege were direct consequences of instances of mail fraud and were not produced 'by reason of a violation of Section 1962.' " 577 F.Supp. at 114-115. On October 19, 1984, the district court's decision was reversed by the

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1. The three remaining state causes of action, allegedly pendent to the federal RICO claims, asserted by the Respondents are: (1) breach of contract; (2) breach of an asserted fiduciary duty; and (3) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, §262.

2. Initially, Respondents commenced their action against ANB alone, with only one RICO claim. However, when ANB filed a Motion To Dismiss contending that ANB could not be both the "person" and "enterprise" as alleged in the initial Complaint, Respondents amended the Complaint, adding Heller and Grayheck and expanded the original single RICO count into two alternative ones.

Court of Appeals for the Seventh Circuit,[3] which held that a civil RICO plaintiff need not allege an injury beyond that resulting from the underlying acts of racketeering.

The Seventh Circuit's analysis is directly contrary to, and explicitly rejects, the decision of the internally divided Court of Appeals for the Second Circuit in its so-called *Sedima* trilogy a scant three months earlier.[4] Petitions for writs of certiorari are presently pending in each of those Second Circuit decisions. Moreover, in light of this patent conflict and pursuant to its Circuit Rule 16(e), the Seventh Circuit circulated the opinion to all its judges for a vote on a rehearing *en banc*. No judge favored a rehearing. (App. A-1, n.1).

3. The Seventh Circuit did affirm one aspect of the district court's decision regarding a portion of one claim in which Respondents alleged that ANB conducted its own affairs through a pattern of racketeering activity. (App. A-42).

4. *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 83-7965 (2d Cir. July 25, 1984), *petition for cert. filed*, (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co.* v. *Rhoades*, No. 83-7636 (2d Cir. July 26, 1984), *petition for cert. filed*, (U.S. Oct. 24, 1984) (No. 84-657); *Furman* v. *Cirrito* No. 84-7113 (2d Cir. July 27, 1984), *petition for cert. filed, sub nom. Joel* v. *Cirrito* (U.S. Oct. 15, 1984) (No. 84-604). Following a denial of a request for an *en banc* hearing in all three cases, the Second Circuit agreed to file the opinions in the order in which they were completed. Thus, the *Cirrito* court had to follow the majority decisions in *Sedima* and *Bankers Trust* although it unanimously expressly disagreed with those opinions.

REASONS FOR GRANTING THE WRIT

In a context of widespread controversy and voluminous federal lawsuits which invoke a statute for commonplace commercial disputes, this case presents issues concerning fundamental policies of national jurisprudence. A decided majority of the courts confronting the question of the scope of RICO has concluded that the purpose and design of the statute address the interference or infiltration of commerce by criminal elements. The cases depart, however, on whether the language of the statute permits an interpretation consistent with its purpose, in contrast to broadly expanding its provisions to create a net that ensnares a vast array of transactions for fear that a few may otherwise escape.

The Seventh Circuit concluded that the statute must be liberally construed, at least in part,[5] so as to afford a claim for treble damages and attorneys' fees whenever a defendant does no more than twice violate one or more in a litany of offenses ranging from securities laws violations to white slave trafficking. Any other reading, the Seventh Circuit declared, produces an undefined or undefinable factor of liability. In sharp contrast, the Second Circuit held that the statutory claim necessarily includes not only the offenses but to paraphrase the statute, an injury to plaintiff by reason of defendant conducting an enterprise through two or more offenses.

Whether the Second Circuit or any court can precisely trace the contours of the claim for all time is immaterial. Numerous statutory concepts, such as the Sherman Act, have been shaped by the evolving adjudication of varied factual settings. Rather, the paramount issue is whether courts are

5. With respect to the relationship between "person" and "enterprise", however, the court departed from its literal interpretation and construed "enterprise" within the context of Section 1962 and not simply as that term is defined in Section 1961. (App. A-32). In contrast, with respect to construing the type of injury required, the Seventh Circuit took the opposite approach — looking only to the Section 1961 predicate offenses and not Section 1962(c).

charged with applying a statute whenever the language allows to assure results consonant with its purpose. In conflict with the Second Circuit, the Seventh Circuit chose to reject any conceptual construction compatible with the statute and instead embraced a simplistic but piecemeal literal reading. In short, the Seventh Circuit sacrificed the statutory design for the sake of illusory certainty.

This conflict between circuits posits extraordinary considerations for this Court. First, the issues are not isolated but are occurring and promise to recur with increasing frequency throughout the nation. Second, further development by future decisions in other circuits is unlikely to yield any greater insight or analysis than the polar positions expressed by the Seventh and Second Circuits. Finally, the pervasive potential to invoke RICO in assorted commercial disputes augurs continued uncertainty, while simultaneously taxing judicial resources.

Accordingly, to avoid a continuation of inconsistent applications and interpretations of RICO on this issue by the lower federal courts resulting in incongruous decisions affecting substantial numbers of litigants, this Court should grant review of this case to determine whether the Seventh Circuit erred in holding that a civil RICO claim exists even though the plaintiff has not alleged an injury by reason of a violation of Section 1962.

I. The Decisions Of The Seventh Circuit And The Second Circuit Directly Conflict

The Seventh Circuit's decision, issued less than three months after the Second Circuit's decisions in the *Sedima* triology, thoroughly disavows the Second Circuit's analysis and reasoning. In so doing, the Seventh Circuit expressly rejected the Second Circuit's position of requiring a RICO injury, concluding "that a civil RICO plaintiff need not allege or prove injury beyond any [sic] injury to business or property resulting from the underlying acts of racketeering." (App. A-28).

In refusing to follow the Second Circuit, the Seventh Circuit criticized *Sedima*'s and *Bankers Trust*'s focus on the purpose and intent of Congress in enacting RICO. (App. A-18 to A-28). Thus, while the Second Circuit viewed RICO's language as ambiguous, requiring an examination of its legislative history and design, it found that RICO "is not ambiguous but . . . extraordinarily broad." (App. A-28). Employing this wooden construction of RICO's language, the Seventh Circuit held that RICO is applicable to this case even though it candidly acknowledged that:

> With respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

(App. A-29).

Even if one were to assume the unambiguity perceived by the Seventh Circuit, its literal reading fails, ironically, to apprehend all the words of the statute. The statutory scheme makes actionable not simply two acts constituting the prescribed or "predicate" offenses, but rather an injury by reason of such offenses committed to acquire, maintain a proprietary interest, or conduct an enterprise through such offenses.[6]

The starting point for all civil RICO claims is Section 1964(c), providing the jurisdictional basis as follows:

> Any person injured in his business or property *by reason of a violation of section 1962* . . . may sue

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6. The Second Circuit did not advance such a reading but rather found ambiguity to fashion additional requirements such as a conviction of the predicate offenses and an overlay of criminality. If the Second Circuit had endorsed the position urged here, the factual patterns in the *Sedima* trilogy may warrant at least a factual issue of a RICO claim.

> therefor . . . and shall recover threefold the damages he sustains. . . .

18 U.S.C. §1964(c) (emphasis added). The Seventh Circuit reasoned that the "by reason of" phrase merely imposes a proximate cause requirement, thus simply requiring that "[t]he criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property." (App. A-28).

What the Seventh Circuit ignored, however, is that Section 1962 has two separate and distinct components: (1) the commission of two predicate acts constituting a pattern of racketeering; and (2) acquiring,[7] maintaining,[8] or conducting[9] an enterprise through the pattern of racketeering. Placing this overall statutory scheme in perspective, it is obvious that subsections (a), (b) and (c) of Section 1962 are deliberately parallel. It is equally as obvious, even under the Seventh Circuit's view, that the commission of predicate offenses only would not violate subsections (a) and (b). In the same vein, subsection (c) contemplates two offenses integrated with the additional factor of an overriding conduct of an enterprise through those offenses which produces harm. To conclude otherwise, as the Seventh Circuit did, that a RICO plaintiff's injury arises only by reason of the underlying predicate acts, effectively abrogates the second prong of a Section 1962 violation. In the name of literalism, the Seventh Circuit rewrote Section 1964 to provide that a person may sue for treble damages under RICO if he has suffered an injury "by reason of a violation of Section *1961*."

The Seventh Circuit's justification for sweeping aside the statutory reference to a violation of Section 1962, as opposed to commission of the predicate acts contained in 1961, appears to be the lack of a precise definition of the requisite

7. 18 U.S.C. §1962(a)

8. 18 U.S.C. §1962(b)

9. 18 U.S.C. §1962(c)

injury. Exhaustively defining the distinction — injury by reason of a violation of Section 1962 compared to injury by reason of the predicate acts listed in Section 1961 — is admittedly not a simple task. Nevertheless, the distinction is patent in comparing the allegations of this case to those in the same circuit in *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984); *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) and *Schacht* v. *Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S.Ct. 508 (1983).

In each of those cases, as well as in *Sedima* and *Bankers Trust*, a pervasive scheme to defraud existed so that an enterprise's activities were actually being conducted through a pattern of racketeering activity. In *Schacht*, for example, the alleged continuing coverup of an insolvent insurance company arose from and depended upon deliberate overstatements of reserves and falsifications of financial statements, fake reinsurance, illegal dividends and systematic looting of the company's most profitable business. 711 F.2d at 1345. As noted in the decision below, the injury in that case occurred, therefore, by reason of the full range of misconduct through which the enterprise was operated, which artificially prolonged its existence and exacerbated its insolvency, not the individual instances of the predicate mail frauds. (App. A-17).

Similarly, in *Sutliff*, the defendants' fraud was characterized as a classic "bust-out" — i.e., stripping a company of its funds and leaving its creditors with uncollectible accounts. 727 F.2d at 651. Likewise, the *Bunker Ramo* defendants created an elaborate enterprise engaged in falsifying purchase orders, invoices and delivery receipts, bribery, and payments for goods never received. 713 F.2d at 1285-1286. Like the *Schacht* situation, the injuries in *Sutliff* and *Bunker Ramo* resulted from the violation of Section 1962, that is by reason of the defendant *operating or conducting an enterprise through* the acts of racketeering.

The Seventh Circuit could not distinguish the injury alleged in *Bankers Trust* from those in *Schacht*, *Sutliff* and

Bunker Ramo and, accordingly, felt compelled to adhere to its prior decisions and repudiate *Bankers Trust*. (App. A-29). In doing so, however, it studiously ignored the striking contrast between the type of injury alleged in this case and the injuries present in *Bankers Trust*, *Schacht*, *Sutliff*, and *Bunker Ramo*. Here, there is no pervasive scheme or infiltration of any type. All that is alleged is that ANB misrepresented the base for the variable interest rate applicable to Respondents' loans. The alleged injury is nothing more than the amount of interest overpaid. Respondents have not and cannot allege facts which show that they were injured by reason of a violation of Section 1962. Despite the absence of that critical allegation, the Seventh Circuit held that they can proceed against Petitioners under RICO.

II. The Issue Involves The Requisite Public Importance To Litigants And Courts Throughout The Nation

The type of injury required under RICO is one which is being confronted by federal courts throughout the country. As the Seventh Circuit noted, those decisions appear equally divided. (App. A-7, n.4).[10] Moreover, although the Seventh Circuit's opinion in this case emphasizes its rejection of the Second Circuit position, it also questions the recent Eighth Circuit decision in *Alexander Grant & Co.* v. *Tiffany Industries*, 742 F.2d 408 (8th Cir. 1984), *petition for rehearing en banc denied* (October 31, 1984).[11]

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10. The Seventh Circuit aptly observed that:

> Whether a claim under section 1964(c) requires a racketeering injury has recently been one of the most hotly disputed RICO issues in the federal courts. The district courts in this circuit have disagreed on the issue, and district courts in other circuits are divided. Although we have not tried to count cases, there does not appear to be a clear weight of authority at the district court level either for or against the racketeering injury requirement.

(App. A-6, 7).

11. The petition for rehearing in *Tiffany* was denied by the Eighth Circuit on October 31, 1984. Counsel for one of the defendants in that case has advised Petitioners' counsel that a petition for a writ of certiorari will soon be filed with this Court.

In *Alexander Grant*, which was decided after the Second Circuit trilogy but prior to this case, the Eighth Circuit rejected *Sedima* but endorsed the racketeering injury requirement of *Bankers Trust* even though it concluded that the Second Circuit's definition of the injury required was "narrower" than that required in the Eighth Circuit. *Id.* at 413. Hence, although the Seventh Circuit's decision may not have originated the confusion and uncertainty which exists among the district and circuit courts as to the type of injury required by RICO, it certainly eliminated any prospect that civil RICO could be interpreted and applied uniformly among the courts.

It is superfluous to labor the obvious consequences of disparate results in civil RICO cases. However, the forum shopping which this conflict will encourage is especially significant in RICO claims founded on violations of the federal securities laws. The broad venue provision contained in the Securities Exchange Act of 1934 permitting venue "in any district . . .wherein the defendant is found or is an inhabitant or transacts business,"[12] exposes a RICO defendant with nationwide facilities to inevitable litigation in a district within the Seventh Circuit.

Further, the increasing volume of RICO lawsuits, precipitated by the lure of treble damages and attorneys' fees, commands the intercession of this Court in order to still the confusion and inconsistent treatment which will continue unless this Court grants certiorari and resolves this issue. The Report of the Director Of The Administrative Office Of The United States Courts, while not tabulating RICO cases as such, reveals that in 1983 approximately 7,000 cases were filed asserting fraud or violations of the federal securities laws.[13] Each of those cases potentially implicate a civil RICO

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12. 15 U.S.C. §78aa.

13. Annual Report Of The Director Of The Administrative Office Of The United States Courts 1983, pp. 245, 247. The potential impact is even greater than these numbers reveal, however, since a large percentage of fraud actions are currently filed in state courts.

claim, particularly considering the breadth of mail fraud. Even a casual observer of the state of the judiciary is aware of the growing prominence of and burgeoning controversy over RICO.[14]

The only possible alternative to a resolution of this conflict by this Court is Congress. However, there is no indication that Congress will undertake to remedy the problem or that it will do so promptly. Indeed, expeditious action is remote in light of Congress' response to this Court's decision in *Northern Pipe Construction Co. v. Marathon Pipe Line Co.*, 458 U.S.50 (1982). Moreover, Congress would no doubt be disinclined to even consider legislation until this Court has spoken on the subject. Finally, even if Congress were to act, any remedy it could provide would be prospective only and not resolve the substantial number of pending cases. Accordingly, to avoid repeated adjudication of inconsistent decisions, this Court should issue a writ of certiorari in this case.

Petitioners further submit that it is imperative for this Court to decide the issue regarding the RICO injury within a context that includes this case. As noted above, there are three separate petitions for certiorari pending in the *Sedima* trilogy. However, to decide the issue from a review of only the *Sedima* trilogy, or any one of those cases, would unnecessarily limit the focus and obscure the consideration of the entire range of cases in which the issue arises. That is particularly so in this case which is the mirror opposite of the *Sedima* trilogy.

Petitioners do not simply urge an affirmance of the Second Circuit in the *Sedima* line of cases. Rather, it is their view that when the correct construction of RICO is applied in those cases, injuries "by reason of a violation of Section 1962" may be found to exist. Here, however, a decisively discrete context is present. The only injury alleged arises from the underlying predicate offenses, not a violation of Section 1962.

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14. The increasing volume of civil RICO cases is further demonstrated by a recent study which revealed that in 1980, only three civil RICO decisions were reported in the National Reporter System compared to 58 in 1983. *See* Sec. Reg. & L. Rep. (BNA) No. 16, at 539 (April 13, 1984).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2529

HAROCO, INC., *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, WALTER E. HELLER INTERNATIONAL CORPORATION, & RONALD J. GRAYHECK,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 1618—**Bernard Decker**, *Judge.*

ARGUED MAY 9, 1984—DECIDED* OCTOBER 19, 1984

Before BAUER and CUDAHY, *Circuit Judges*, and KELLAM, *Senior District Judge.***

CUDAHY, *Circuit Judge.* This appeal presents several issues involving civil claims under the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute. 18 U.S.C. §§ 1961-1968. The central issue concerns the type of injury a private civil plaintiff must allege to support a RICO claim under 18 U.S.C. § 1964(c). We must also consider several questions involving the RICO provisions requiring that a "person" conduct or participate in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity, as those terms are defined in RICO. 18 U.S.C. § 1962(c). We affirm in part and reverse in part.

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* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of the conflict with the Second Circuit cases of *Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965 (2d Cir. July 25, 1984); *Bankers Trust Co. v. Rhoades*, No. 83-7636 (2d Cir. July 26, 1984); and *Furman v. Cirrito*, No. 84-7113 (2d Cir. July 27, 1984).

** Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, is sitting by designation.

I

This is an appeal from the district court's dismissal for failure to state a claim. We shall therefore treat all allegations in the complaint as true and view them in the light most favorable to plaintiffs. The case arises from loans made by defendant American National Bank & Trust Company of Chicago ("ANB") to plaintiffs. Plaintiffs are several businesses, Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co. Haroco independently and together with other plaintiffs borrowed several million dollars from ANB between 1979 and 1981. Each loan agreement provided that the rate of interest would be "one per cent over the bank's prime rate," and the prime rate was defined as the "rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans." The defendants, in addition to ANB, are Ronald J. Grayheck, who is an officer and director of ANB, and Walter E. Heller International Corporation ("Heller International"), which is the parent company of ANB.[1]

Plaintiffs brought this action in March 1983 alleging that defendants had defrauded them in the calculation of the prime rate which determined their own variable interest payments. The only alleged injuries were excessive interest charges resulting from defendants' calculation of the prime rate. Plaintiffs included in their complaint three state law causes of action and two counts based on alleged violations of the federal Racketeer Influenced and Corrupt Organizations ("RICO") provisions in 18 U.S.C. §§ 1961-1968.[2] As we shall explain in more detail below, plaintiffs' RICO claims were predicated on

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[1] According to the complaint, ANB has at all relevant times been either a wholly owned subsidiary of Heller, or a wholly owned subsidiary of American National Corporation, which in turn is a wholly owned subsidiary of Heller.

[2] RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922.

defendants' use of the mails in furtherance of the alleged scheme to defraud plaintiffs by overstating the prime interest rate. Count I of the amended complaint alleged that defendant ANB violated 18 U.S.C. § 1962(c) by conducting ANB's and Heller International's affairs through a pattern of racketeering activity. Count II alleged that defendants Heller International and Grayheck violated section 1962(c) by conducting ANB's affairs through a pattern of racketeering activity.

Defendants moved on three principal grounds to dismiss the RICO counts. First, they argued that plaintiffs failed to allege the requisite causal relationship between their injuries and the RICO violations. Second, defendants argued that plaintiffs failed to allege the requisite relationships between "persons" and the "enterprises," the affairs of which were allegedly conducted through patterns of racketeering activity. Third, defendants argued that plaintiffs had not pleaded the predicate acts of mail fraud with the necessary particularity.

The district court concluded that the plaintiffs had failed to state claims under RICO because they did not allege that they had suffered any injury by reason of a RICO violation in addition to the injuries caused by the alleged mail fraud. The district court held "that a plaintiff's injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of predicate offenses, such as acts of mail fraud." *Haroco, Inc. v. American National Bank & Trust Co.*, 577 F. Supp. 111, 114 (N.D. Ill. 1983). The district court therefore dismissed plaintiffs' RICO claims without reaching defendants' other arguments. Because there was no other ground for federal jurisdiction, the district court also dismissed the remaining pendent state law claims.

II

Before proceeding to the specific issues raised on this appeal, we must first sketch RICO's broad civil provisions. This court recently said that the civil RICO provisions are

"constructed on the model of a treasure hunt." *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 652 (7th Cir. 1984). We begin the hunt with 18 U.S.C. § 1964(c), which provides the private cause of action:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The next step is to examine section 1962, which describes the prohibited conduct. In this case, the most relevant portion of the section provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). We must next turn to section 1961, which provides special statutory definitions for the key terms of section 1962(c). "Racketeering activity" is defined in section 1961(1) in terms of a long list of state and federal crimes, including mail fraud, 18 U.S.C. § 1341. A person commits mail fraud by using the mails for the purpose of executing a scheme or artifice to defraud. 18 U.S.C. § 1341; *United States v. Wormick*, 709 F.2d 454, 461-62 (7th Cir. 1983). A "pattern of racketeering activity," as required by section 1962(c), requires at least two acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5). The individual acts of racketeering activity, such as the alleged mail fraud in this case, are usually described as the "predicate offenses."

RICO also defines "person" and "enterprise" very broadly. The term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). The term "enterprise"

includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

RICO's terms are obviously very broad. Because various fraud offenses are included in the definition of "racketeering activity," RICO claims (with their treble-damage provisions) have recently become attractive to many plaintiffs in commercial disputes that otherwise might involve only breach of contract, or securities or state law fraud claims. In cases involving allegations of commercial fraud, for example, it is often possible for a plaintiff to allege two acts of mail fraud, thus constituting a "pattern of racketeering activity," and to allege further that the defendant conducted the affairs of an "enterprise" through that pattern of racketeering activity in violation of section 1962(c). Whether RICO's broad terms should be read literally to permit RICO claims in instances of such "garden variety" fraud has recently been the subject of extended debates in the federal courts. The central issue in this case concerns the type of injury a plaintiff must allege to sustain a RICO claim.

III

The district court concluded that the plaintiffs were required to allege some injury in addition to injuries resulting from the predicate acts of racketeering. The courts imposing such a requirement have often referred to the additional injury as a "racketeering injury" or "racketeering enterprise injury." We shall use the term "racketeering injury." The district court focused on the requirement in 18 U.S.C. § 1964(c) that the RICO plaintiff be injured "by reason of a violation of section 1962," and interpreted that language to mean that allegations of injuries resulting only from the predicate acts of racketeering would not support a RICO claim. 577 F. Supp. at 113-15. Because the only alleged injuries in this case were excessive interest payments resulting from the underlying fraud, the district court dismissed the RICO

counts. The district court did not suggest what additional injuries might satisfy section 1964(c).

At the outset we should avoid confusion by distinguishing a "racketeering injury" from the elements of a RICO cause of action spelled out explicitly in the statute. There can be no doubt that to state a claim under RICO, a civil plaintiff must allege more than the occurrence of two predicate acts of racketeering from the list in section 1961. The elements of a civil RICO claim are set forth in sections 1964(c) and 1962. The plaintiff must allege an injury to "business or property," and that injury must be "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). In this case we are concerned only with the conduct prohibited by subsection (c) in section 1962, and not with the provisions of subsections (a), (b) or (d). To allege a violation of section 1962(c), the plaintiff must allege that the defendant (1) was employed by or associated with (2) an enterprise engaged in, or the activities of which affected, interstate or foreign commerce, and (3) that the person conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity. *Alcorn County v. U. S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1167-68 (5th Cir. 1984); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984).

The "racketeering injury" requirement imposed by the district court here goes farther than this elementary exposition of RICO. The district court required a special kind of injury for RICO claims. That "racketeering injury" is presumably something peculiar to RICO, although the district court here did not explain what the requirement is.

Whether a claim under section 1964(c) requires a racketeering injury has recently been one of the most hotly disputed RICO issues in the federal courts. The district courts in this circuit have disagreed on the issue,[3]

[3] In addition to the district court's decision in this case, *Haroco, Inc. v. American National Bank & Trust Co.*, 577 F. Supp. 111,

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and district courts in other circuits are also divided.[4] Although we have not tried to count cases, there does not appear to be a clear weight of authority at the district court level either for or against the racketeering injury requirement.

[3] *continued*

114-15 (N.D. Ill. 1983), the district court concluded that a racketeering injury is required under RICO in *County of Cook v. Midcon Corp.*, 574 F. Supp. 902, 919-20 (N.D. Ill. 1983) (Leighton, J.). District court decisions in this circuit refusing to require a racketeering injury include *Kosch v. Parkway Bank & Trust Co.*, No. 83 C 4832, slip op. at 8-9 (N.D. Ill. March 9, 1984) (Getzendanner, J.); *Addis v. Moser*, No. 83 C 6118, slip op. at 12-18 (N.D. Ill. Feb. 15, 1984) (Marshall, J.): *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1318-20 (N.D. Ill. 1983) (Aspen, J.).

[4] District court decisions in other circuits holding squarely that a plaintiff must prove "something more" or a racketeering injury include: *Margolis v. Republic National Bank*, 585 F. Supp. 595, 597 (S.D.N.Y. 1984); *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984); *Furman v. Cirrito*, 578 F. Supp 1535, 1539-41 (S.D.N.Y. 1984), *aff'd*, No. 84-7113 (2d Cir. July 27, 1984); *Hudson v. Larouche*, 579 F. Supp. 623, 630 (S.D.N.Y. 1983); *Dakis v. Chapman*, 574 F. Supp. 757, 761 (N.D. Cal. 1983); *Richardson v. Shearson/American Express Co.*, 573 F. Supp. 133, 137 (S.D.N.Y. 1983), *disavowed by author, Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 414 (S.D.N.Y. 1984); *In re Action Industries Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 718-19 (D.D.C. 1983); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades*, No. 83-7636 (2d Cir. July 26, 1984); *Barker v. Underwriters at Lloyd's*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Harper v. New Japan Securities Int'l., Inc.*, 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

District court decisions from other circuits holding squarely that a RICO plaintiff need not allege a racketeering injury include: *Minpeco S.A. v. Conticommodity Services, Inc.*, No. 81 Civ. 7619, slip op. at 2 (S.D.N.Y. March 28, 1984); *Estee Lauder, Inc. v. Harco Graphics, Inc.*, No. 82 Civ. 8188, slip op. at 3

(Footnote continued on following page)

Among the courts of appeals, the situation is more complicated. In *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983), the leading Seventh Circuit case on civil RICO, we rejected several arguments which are closely related to the racketeering injury question. After oral argument in this case, the Second Circuit issued three decisions which, together, amount to an en banc ruling by the Second Circuit in support of some sort of racketeering injury requirement. *Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965 (2d Cir. July 25, 1984); *Bankers Trust Co. v. Rhoades*, No. 83-7636 (2d Cir. July 26, 1984); *Furman v. Cirrito*, No. 84-7113 (2d Cir. July 27, 1984).[5] In addition, several recent decisions by this and other courts assume that injuries resulting from the predicate acts of racketeering satisfy RICO's requirements.

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[4] *continued*

(S.D.N.Y. March 21, 1984); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); *In re Catanella*, 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984); *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 414 (S.D.N.Y. 1984); *Charing Cross, Inc. v. Riggs Nat'l Bank*, No. 82-2207, slip op. at 10-14 (D.D.C. Oct. 7, 1983); *Slattery v. Costello*, 586 F. Supp. 162, 167 (D.D.C. 1983); *Yancoski v. E. F. Hutton & Co.*, 581 F. Supp. 88, 96 & n.19 (E.D. Pa. 1983); *Kirschner v. Cable/Tel. Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983); *In re Longhorn Securities Litigation*, 573 F. Supp. 255, 269-70 (W.D. Okla. 1983); *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1156-57 (D.N.J. 1983), *aff'd in part and rev'd in part, both on other grounds*, No. 83-5575 (3d Cir. Sept. 6, 1984); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates, Inc. v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983).

[5] The panel in *Furman v. Cirrito* explained that the three panels had tentatively reached conflicting results on the issue, and a request for en banc consideration of the other cases was denied. Slip op. at 5639. Although the members of the panel in *Furman* disagreed with the other decisions, they felt compelled, in light of the denial of en banc consideration, to follow *Sedima* and *Bankers Trust*.

Sutliff, Inc. v. Donovan Companies, supra, 727 F.2d at 653-54; *Alcorn County v. U. S. Interstate Supplies, Inc., supra*, 731 F.2d at 1169; *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1288 (7th Cir. 1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361, *cert. denied*, 104 S. Ct. 527 (1983).[6]

Courts on both sides of the racketeering injury dispute have claimed that they are merely following the "plain" meaning of section 1964(c). *Compare Bankers Trust Co. v. Rhoades, supra*, slip op. at 5619 (plain meaning requires a distinct RICO injury), *with Furman v. Cirrito, supra*, slip op. at 11 (language is clear and does not require racketeering injury). We therefore suspect that we shall have to do more than stare at the language of section 1964(c) to decide this issue.

The initial hurdle for proponents of the racketeering injury is merely to define it, for "a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it," *Alexander Grant & Co. v. Tiffany Industries, supra*, slip op. at 10. Neither the district court nor the defendants in their brief have made any effort to define the requirement, but they are not alone in this respect. Many district courts have imposed on RICO plaintiffs a racketeering injury requirement without explaining what the requirement is. *See, e.g., Hudson v. Larouche*, 579 F. Supp. 623, 630 (S.D.N.Y. 1983); *Furman v. Cirrito*, 578 F. Supp. 1535, 1539-41 (S.D.N.Y. 1984), *aff'd*, No. 84-7113 (2d Cir. July

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[6] The Eighth Circuit position has been clouded by *Alexander Grant & Co. v. Tiffany Industries*, No. 83-1608 (8th Cir. Aug. 22, 1984), which rejects *Sedima* as inconsistent with *Bennett v. Berg*, but finds the racketeering injury requirement of *Bankers Trust* consistent with its own decision. *Alexander Grant & Co.*, slip op. at 6 n.7, 10-11. It is not entirely clear to us how the *Alexander Grant* court distinguishes between the necessity of pleading a racketeering injury as here defined and the necessity of alleging the existence of an enterprise in order to make out a violation of section 1962(c). *Compare id. with supra* at 6.

27, 1984); *King v. Lasher*, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 718-19 (D.D.C. 1983); *Barker v. Underwriters at Lloyd's*, 564 F. Supp. 352, 358 (E.D. Mich. 1983). Those district courts which have rejected a racketeering injury requirement have often remarked on this lack of explanation and the difficulty of definition as major reasons for rejecting it. *E.g., In re Catanella*, 583 F. Supp. 1388, 1436-37 (E.D. Pa. 1984).

Instead of defining a racketeering enterprise injury, at least two district courts have refused to do so, insisting only that they would know a racketeering enterprise injury when they saw one. *Willamette Savings & Loan v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1430 (D. Ore. 1984) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983) (citing *Jacobellis v. Ohio, supra*).

The Second Circuit's recent trilogy of decisions represents the most comprehensive effort to date to define and justify the racketeering injury requirement, and we shall deal with that definition here. As we shall explain in more detail below, the Second Circuit's new definition of the racketeering injury requirement appears to be essentially an amalgamation of proposed limits on RICO which we rejected in *Schacht v. Brown, supra*, as contrary to the language and purpose of RICO. We therefore view *Schacht* as controlling in this case; we could not follow the Second Circuit without essentially overruling *Schacht*.

We must examine in some detail both the precise holdings and the mode of statutory interpretation adopted in *Schacht*. The plaintiffs there alleged that the defendants had engaged in an elaborate fraudulent scheme involving the reorganization of an insolvent insurance company. According to the complaint, the defendants had defrauded the state director of insurance by concealing the extent of the insolvency and by drawing away the company's more profitable business for their own benefit through a reorganization scheme. The defendants

allegedly convinced the state director to permit the insolvent company to continue writing unprofitable insurance, thus leading to the further dissipation of the company's remaining assets. 711 F.2d at 1345-46. The company's losses from the fraudulent scheme were allegedly substantial enough to have injured the company's policyholders and creditors in addition to its shareholders. 711 F.2d at 1348-49.

This court upheld the RICO counts in *Schacht* against numerous challenges. The defendants' primary attack was that Congress did not intend to apply RICO to "garden variety" business fraud or securities cases. Our treatment of that challenge in *Schacht* sets the tone for our analysis of RICO statutory issues here. We said there:

> We agree that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered this issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute.

711 F.2d at 1353. Our approach to RICO in *Schacht* was based heavily on the Supreme Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981), where the Court said:

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state

> crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

452 U.S. at 586-87 (citations omitted).

It is true that the legislative history includes relatively little material on RICO's private civil remedy, *see Sedima, S.P.R.L. v. Imrex Co., supra*, slip op. at 5553 ("clanging silence of the legislative history"), but it is also clear that Congress deliberately chose the very broad language of RICO's provisions. Both the proponents and the opponents of RICO recognized the extraordinary breadth of its terms.[7] The opponents argued that the breadth of the statute might chill civil liberties, and the proponents of RICO defended the broad terms on the grounds that narrower terms would provide loopholes through which the primary targets of RICO might escape. Indeed, the unifying thread of RICO's legislative development was a desire to avoid creating loopholes for clever defendants and their lawyers. "In short, Congress chose to provide civil remedies for an enormous variety of

[7] The court in *Sedima* noted the dangers of deriving legislative intent from parades of horrors in opponents' speeches, slip op. at 5549-50 n.22, but RICO's proponents also recognized the broad scope and the potential for unexpected applications.

> conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent. legislative draftsmanship." *Schacht*, 711 F.2d at 1354-55. As we said more recently in response to a similar challenge:
>
> > But Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes.
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> *Sutliff, Inc. v. Donovan Cos., supra*, 727 F.2d at 654. *See Moss v. Morgan Stanley, Inc., supra*, 719 F.2d at 21 (it is not the judiciary's role to reassess Congress's balance of costs and benefits of RICO).

In addition, even if Congress had meant to leave the door open to narrower judicial interpretations of the statute, we said in *Schacht* that many of the provisions of RICO are so broad that "there is simply no legitimate principled criterion" for accomplishing that task. 711 F.2d at 1356. For example, since Congress itself rejected any attempt to employ the concept of "organized crime" in any colloquial sense in the language of RICO, the courts have thoroughly repudiated the contention that the civil provisions of RICO apply only to organized crime. *See Schacht, supra*, 711 F.2d at 1353-54; *Alcorn County, supra*, 731 F.2d at 1167; *Moss v. Morgan Stanley, Inc., supra*, 719 F.2d at 21 & n.17; *Bennett v. Berg, supra*, 685 F.2d at 1063; *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). And without reviving the discredited "organized crime" approach, the other deliberately broad terms of RICO, such as "person," "enterprise," "conduct" and "participate," offer few toeholds for courts seeking to narrow RICO's application.

The defendants in *Schacht* argued, as do the defendants here, that the plaintiffs had not alleged the proper type of injury for a RICO claim. We considered and

rejected several variations on the theme. First, defendants argued, based on a loose analogy to the antitrust laws, that RICO claims are limited to claims for "competitive" injuries. *See North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980); Note, *Reading the "Enterprise" Element Back Into Rico: Sections 1962 and 1964(c)*, 76 NW. U. L. REV. 100, 126-28 (1981). We rejected that argument. 711 F.2d at 1356-58. *See also Bennett v. Berg, supra*, 685 F.2d at 1058-59 (rejecting competitive injury requirement); *Bunker Ramo Corp. v. United Business Forms, Inc., supra*, 713 F.2d at 1287-88 (same).

Although there can be little doubt that criminal infiltration of businesses and injury to free competition in the marketplace were major concerns of Congress in enacting RICO, it is also clear that Congress's concerns extended much farther. *United States v. Turkette, supra*, 452 U.S. at 590-91. We agree that a business competitor harmed by infiltration or by other effects of racketeering might well be able to state a claim under RICO by alleging a "competitive" injury. *See Addis v. Moser*, No. 83 C 6118, slip op. at 14 & n.9 (N.D. Ill. Feb. 15, 1984); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (competitive injury could in some cases be cognizable under RICO). While a competitive injury might be *sufficient* to sustain a RICO claim, a competitive injury is, under *Schacht* and *Bennett v. Berg*, not *necessary* to state a RICO claim. For a thorough, recent discussion of the competitive injury requirement and relevant legislative history, *see In re Catanella*, 583 F. Supp. 1388, 1431-34 (E.D. Pa. 1984).[8]

[8] Some courts have justified their construction of section 1964(c)'s "by reason of" language with an analogy to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), in which the Supreme Court held that an antitrust plaintiff must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." The analogy has limited usefulness. The central factor in *Brunswick*

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Schacht also rejected the argument that civil RICO claims should be limited only to those who are *indirect* victims of racketeering activity. 711 F.2d at 1356-58. The defendants had argued that those parties directly victimized by the alleged fraud could seek other, pre-existing legal remedies, which Congess had not meant to supplant. RICO, they argued, should be limited to parties who were not themselves the victims of racketeering and who suffered consequential or remote injury from the racketeering. This argument, of course, was very closely related to the claim that civil RICO is limited to competitive injuries. We noted in *Schacht*, 711 F.2d at 1355-56, that Congress was well aware of existing criminal and civil provisions for racketeering activity, but that Congress viewed those remedies as inadequate in the face of organized crime. *See United States v. Turkette, supra*, 452 U.S. at 586-87. Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims. As we said in *Schacht v. Brown*, "RICO was designed to protect *direct*, and not just second-order, victims of organized crime infiltration." 711 F.2d at 1358.

Limiting civil RICO recoveries to indirect victims would produce odd consequences and, in some cases of

[8] *continued*

was that the plaintiffs claimed damages suffered by reason of *increased* competition. The Supreme Court recognized that such an award would be "inimical to the purposes" of the antitrust laws, 429 U.S. at 488, and would "divorce[ ] antitrust recovery from the purposes of the antitrust laws," *id.* at 487. By contrast, taking RICO's terms at face value might extend RICO *beyond* its expressly contemplated applications, but it in no way *undermines* RICO's purposes. As the Supreme Court has said of RICO, "[t]he aim is to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette, supra*, 452 U.S. at 585. Restrictive standing requirements analogous to those in antitrust laws would too often leave those gains in the hands of the RICO violators. *See Schacht, supra*, 711 F.2d at 1357-58; *Bennett v. Berg, supra*, 685 F.2d at 1059; *In re Catanella, supra*, 583 F. Supp. at 1433-34.

RICO violations, would prevent civil recoveries altogether. Consider, for example, a small business subjected to repeated extortionate demands for protection money.[9] The business would surely be the victim of racketeering activity as defined in section 1961. And the owner might well be able to show that the extortionists violated section 1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity. Yet, under an indirect injury requirement, the owner could not sue the extortionists under RICO; instead, RICO's provisions would be limited to indirect victims, if there were any, such as the extortionists' competitors.[10] *See also Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983) (example describing problems with indirect injury requirement). The Supreme Court recently explained that Congress enacted RICO primarily to attack the sources of organized crime's economic power. *Russello v. United States*, 104 S. Ct. 296, 302-03 (1983). Congress, while concerned with infiltration of legitimate business, also had the broader purpose of separating racketeers from their profits. *Id.* An "indirect injury" requirement would contravene the statute and Congress's intent by preventing the direct victims of racketeering activity from suing under RICO to recover their "contributions" to the racketeers' profits.

Thus, in *Schacht* we rejected the argument that civil RICO actions are limited only to situations involving "organized crime," and we rejected several arguments in support of special RICO injury requirements because we found no basis for them in the language, purpose or legislative history of RICO. We recognized that RICO's language extends beyond those concerns which were the immediate focus of the legislation, but we also recognized that Congress was fully aware of the extraordinary breadth of the language. Even though Congress might

[9] This hypothetical is drawn from *In re Catanella, supra*, 583 F. Supp. at 1433-34.

[10] We suspect that competing extortionists would be unlikely to sue under RICO.

not have fully contemplated all of the consequences or applications of those very broad terms, Congress nevertheless deliberately chose to use the broad terms to ensure that the criminal and civil provisions would be effective. Further, even if Congress had meant to invite the courts to limit the broad reach of RICO, it provided few if any textual pegs which could permit courts to develop reasoned, consistent and principled limits without simply redrafting the statute. If, for policy reasons, it appears to be the better course to restrict the scope of RICO, then Congress—not the courts—is the body to do it. 711 F.2d at 1353-56.

In a relatively brief section of the opinion in *Schacht* captioned "Injury 'By Reason of' A § 1962(c) Violation," we addressed an argument couched in terms similar to defendants' argument in this case. Without deciding whether a racketeering injury requirement should be imposed, and also without defining such a requirement, we concluded that any such requirement had been satisfied by the allegations of injuries resulting from the insurance company's continued operation as procured by the predicate fraud offenses. 711 F.2d at 1358-59. As noted, defining the racketeering injury requirement has been the primary hurdle for its proponents. The appellants' briefs in *Schacht* offered no useful definition of the asserted requirement other than competitive injury, and they acknowledged the ambiguity of the requirement as developed by the courts up to that time. Since *Schacht* was decided, the debate has continued, and the Second Circuit's recent trilogy offers the most comprehensive effort to date to define the racketeering injury requirement. Our discussion of the requirement in *Schacht*, 711 F.2d at 1358-59, has thus been outdated by courts' further development of the concept.[11] Upon close examination, however, the Second Circuit's proposed definition appears to be only a composite of the various proposed standing or injury

[11] That portion of the *Schacht* opinion has been the subject of widely varying interpretations. *See In re Catanella, supra*, 583 F. Supp. at 1435 n.68, and cases cited therein.

limits rejected in *Schacht*. The controlling portions of the *Schacht* opinion are therefore those discussing the proposed competitive and indirect injury requirements and the application of RICO to business frauds.

We now turn to the Second Circuit's recent cases on the racketeering injury requirement. Although the contours of the Second Circuit's racketeering injury are not yet entirely clear, the Second Circuit's decisions conflict with our decision in *Schacht v. Brown*, and we decline to follow them.

The lead case in the trilogy is *Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965 (2d Cir. July 25, 1984). The plaintiff and defendants in that case had entered into a joint venture for the export of goods to Europe. The plaintiff alleged that the defendants defrauded it by preparing purchase orders, invoices and credit memoranda that they knew falsely overstated purchase prices, attendant costs and shipping and financing charges. Slip op. at 5537. The complaint included three RICO counts based on 18 U.S.C. § 1962(c) and (d). The district court dismissed the RICO counts on the ground that the plaintiff had failed to allege any injury that was something more than or different from the injuries resulting from the predicate acts of mail and wire fraud. In a lengthy opinion by Judge Oakes, with Judge Cardamone dissenting, the Second Circuit affirmed the dismissal of the RICO counts because the plaintiff had not alleged a "racketeering injury." Slip op. at 5560-62.[12]

The majority in *Sedima* noted that organized crime was the primary target of RICO and expressed its dismay at the application of RICO to many "respected and legiti-

[12] In *Sedima* the Second Circuit also held that before a civil RICO action may be brought, "there must be a 'violation,' that is, criminal convictions on the underlying predicate offenses." Slip op. at 5576. That holding conflicts with our decision in *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983). The issue is not presented in this appeal.

mate" businesses. The majority concluded that the application of RICO beyond its original stated purposes showed that the statute was "ambiguous," slip op. at 5544, and then undertook a thorough examination of RICO's legislative history.[13] The majority's review of the history shows convincingly that the private civil RICO provisions of section 1964(c) received relatively little attention from Congress in the enactment of the omnibus Organized Crime Control Act. The issue is what conclusions should be drawn from that fact. The *Sedima* court said:

> The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications.

Slip op. at 5553. The court then discussed the various "standing" barriers that courts have sought to erect against civil RICO claims and acknowledged the complete lack of consensus on civil RICO's requirements. The *Sedima* majority focused its consideration on the "by reason of a violation of section 1962" language in section 1964(c) and endorsed some form of racketeering injury requirement. The majority discussed the antitrust analo-

[13] In *Schacht, supra*, we concluded that while RICO's terms are very broad, the terms in dispute there were not ambiguous. 711 F.2d at 1353-56. We discuss below the appropriate role for courts when dealing with deliberately broad, as opposed to ambiguous, statutory terms.

gy relied on by some courts in imposing a competitive injury requirement. The court concluded that Congress did not intend to import all of the concepts of antitrust standing into civil RICO actions, but it said "there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language." Slip op. at 5560.

The majority then attempted to define a racketeering injury. In doing so, it focused on the importance of organized crime in congressional consideration of RICO. In the key passage defining a racketeering injury, the court said:

> RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. It was to help solve this problem that Congress added RICO to the arsenal of weapons used to fight organized crime. It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.

Slip op. at 5561. Finally, the court also said that the plaintiff must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." Slip op. at 5562.

On the basis of these statements, it appears that *Sedima* has revived the discredited "organized crime nexus" requirement without quite saying so. *Cf. Alexander Grant & Co. v. Tiffany Industries*, No. 83-1608, slip op. at 11 (8th Cir. Aug. 22, 1984) (*Sedima* holds that "section 1964(c) requires that the injury result from mobster activity or the efforts of organized crime"). The passage defining racketeering injury refers to mobsters and organized crime, slip op. at 5561, and the rest of the

opinion repeatedly emphasizes the references in the legislative history to mobsters, racketeers and particular organized criminal groups. In addition, the *Sedima* panel professed its shock and dismay at the fact that RICO allegations have labeled as racketeers "such respected and legitimate 'enterprises' as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch." Slip op. at 5543.

Of course, the criminal application of RICO has never been limited to "mobsters" or "organized crime." And on the civil side, every circuit that has considered the issue, including the Second, has expressly rejected the notion that "organized crime," in any colloquial sense of the phrase, must be involved in order for RICO to be violated. *See supra* at 13.[14]

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[14] Moreover, the white-collar crime alleged in some RICO complaints against "legitimate" businesses is in some ways at least as disturbing as the bringing of RICO claims against "legitimate and respected" defendants. For example, the facts alleged in *Bennett v. Berg*, *supra*, 685 F.2d at 1056-57, decided by the Eighth Circuit, illustrate concerted white-collar criminal conduct of a type at the core of Congress' concern in enacting RICO. There the defendants included various businessmen, respected lawyers and accountants, and a well-known insurance company. The defendants were alleged to have concocted an elaborate fraudulent scheme which had induced elderly people to invest most of their assets in a retirement village which the defendants, through fraudulent self-dealing and mismanagement, then took to the brink of bankruptcy, leaving the elderly people with neither their assets nor the "life care" they had bargained for. As Judge Pratt said in *Furman v. Cirrito*, *supra*, Congress

> provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud," we can only conclude that by the RICO statute Congress has provided an additional means to weed that "garden" of its fraud. It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm.

Slip op. at 5648.

In *Schacht*, after we rejected the contention that RICO was meant to apply only to "organized crime," we disapproved the competitive and indirect injury arguments in part because there seemed to be no way to impose them without reviving the "organized crime" requirement. 711 F.2d at 1356. We said that we did not "wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO." In view of the *Sedima* court's repeated discussion of organized crime and "mobsters," and the phrasing of the racketeering injury requirement, that seems to be precisely what the Second Circuit has done in *Sedima*. *See Sedima*, slip op. at 5590-91 (Cardamone, J., dissenting) (racketeering injury requirement is only a euphemism for an organized crime nexus requirement); *Alexander Grant & Co., supra*, slip op. at 11 (finding *Sedima* imposes a requirement of mobster activity or organized crime involvement for racketeering injury). *Cf. Moss v. Morgan Stanley, Inc., supra*, 719 F.2d at 21 (2d Cir.) (rejecting organized crime nexus requirement). *Sedima* accurately describes Congress's central purposes in passing RICO, but the application of RICO has never been limited to those purposes.

Sedima also blended elements of competitive injury and indirect injury into its racketeering injury requirement. The opinion talks not only about mobsters but also about "systemic harm to competition and the market," which thereby injures "investors and competitors." Slip op. at 5561. The *Sedima* court said it was not importing every detail of the standing requirements from antitrust law; for example, it said that an actual anticompetitive effect need not be proved if the injury were of the type which would ordinarily threaten competition. *Id.* at 5561-62 & n.41. However, to the extent that *Sedima* limits civil RICO recoveries to even a general type of competitive injuries rather than strictly to injuries compensable under antitrust law, *Schacht* still rejected that argument in this circuit. 711 F.2d at 1356-58.

Further, to the extent that *Sedima* closes the civil RICO door except to investors injured by mobsters' infiltration of legitimate business or by systemic harm to competition or to the market, that limitation again seems indistinguishable from the indirect injury requirement rejected in *Schacht*. 711 F.2d at 1356-58. As we said there, "RICO was designed to protect *direct*, and not just second-order, victims of organized crime infiltration." 711 F.2d at 1358. Where racketeers violate section 1962 and indirectly injure investors, we do not doubt that RICO may offer investors a civil remedy. But we rejected in *Schacht* any effort to limit RICO to such indirect victims.

Sedima must be read together with the Second Circuit's decision in *Bankers Trust Co. v. Rhoades, supra*, decided the day after *Sedima*. We must consider whether *Bankers Trust* might offer an additional approach to a racketeering injury requirement not already foreclosed in this circuit by *Schacht* and other decisions. We conclude that while *Bankers Trust* differs from *Sedima* in significant ways, the *Bankers Trust* approach to racketeering injury also conflicts with the law of this circuit. *But cf. Alexander Grant & Co., supra*, slip op. at 11 (rejecting *Sedima* for imposing organized crime requirement in conflict with *Bennett v. Berg, supra*, but finding its own decision consistent with *Bankers Trust*).

In *Bankers Trust*, the plaintiff was a creditor who alleged that the defendants had, over a nine year period, engaged in a pattern of bankruptcy fraud by shuffling assets from one owner to another in order to prevent collection of a debt. The plaintiff also alleged that the defendants had, as part of the same effort to prevent collection, instituted numerous frivolous lawsuits against plaintiff and had gone so far as to bribe a state judge in one action. Plaintiff alleged as injuries resulting from defendants' fraudulent conduct its inability to collect its debt and its legal fees incurred in the frivolous and corrupt lawsuits against it.

The Second Circuit held in *Bankers Trust* that the plaintiff had not stated a claim under RICO because it had

not alleged an injury "by reason of a violation of section 1962." The court held that a violation of section 1962 occurs "only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury." Slip op. at 5618 (footnote omitted). The court said that it agreed with the panel in *Sedima* that a civil RICO plaintiff "must allege a proprietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation." *Id.* (footnote omitted).

Applying this standard to the complaint in the case, the court concluded that the plaintiff had alleged only injuries caused by the predicate acts. The plaintiff's loss on the debt was caused by the defendants' bankruptcy fraud:

> The fact that later actions by the defendants may have prevented Bankers from remedying the injury caused it in 1976 does not mean that Bankers was injured by the "pattern" of the bankruptcy fraud and the later acts. Similarly, Bankers's forced expenditures of legal fees in connection with frivolous and corruptly conducted lawsuits occurred as a result of the defendants' distinct conduct in pursuing those lawsuits; Bankers's expenses would have been incurred regardless of any other predicate acts performed by the defendants.

Slip op. at 5621-22. The plaintiff in *Bankers Trust* had argued that there is no meaningful distinction between injury from the predicate acts and injury from the pattern of racketeering activity because a person injured by the predicate acts is *ipso facto* injured by the pattern. The court rejected that argument: "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury." Slip op. at 5620.

Bankers Trust thus requires that each element of the section 1962 violation—including the pattern of racketeering activity *and* the role of the racketeering activity in the investment in, control of, or participation in an enterprise—contribute to cause the plaintiff's injury. *See* slip op. at 5618-20. A plaintiff's injury is compensable under RICO if and only if each element of the section 1962 violation is a but-for cause of the injury. *See* slip op. at 5620.

In *Bankers Trust* the court sought to illustrate its racketeering injury requirement with two examples which, the court suggested, would satisfy the requirement:

> Further, we can envision a number of circumstances in which injury could be attributable to a pattern but not to the individual predicate acts. For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. Or, a plaintiff might be forced to incur an unwanted debt or to take on an unwanted business partner because an enterprise has placed his business in jeopardy by using felonious means to cause a number of his customers to withhold their custom. In each instance, the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern of racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury.

Slip op. at 5620-21.

The court's illustrative examples are inconsistent with the rest of the opinion. In both examples the "racketeering injuries" would depend on the *pattern* of racketeering acts. But earlier in the opinion, the court insisted that all

elements of a section 1962 violation, including the use of the pattern of racketeering activity to invest in, control or conduct an "enterprise," must be but-for causes of the injury. Slip op. at 5618. The injuries in both examples would be entirely independent of the relationship between the racketeering acts and the enterprise which the defendant may have invested in, controlled or conducted. According to the rest of the opinion, therefore, the injuries in the examples would not, without more, be compensable under RICO.

Bankers Trust also appears to conflict with even the narrow view of racketeering injury adopted in *Sedima*. *See Alexander Grant & Co., supra*. As we have said, *Sedima* appears to be primarily concerned with the activities of mobsters infiltrating legitimate businesses. To take another hypothetical example, suppose that "mobsters" threatened a number of shareholders in a small business and forced some of the shareholders to sell their interests in the business for a fraction of their true value. The "mobsters" might thereby acquire control of the business and operate it to the detriment of the remaining shareholders. Such conduct would appear to be at the core of the *Sedima* court's view of RICO. *See* slip op. at 5561-62. Yet according to the opinion in *Bankers Trust*, those shareholders who were threatened and forced to sell out would have no RICO claims because each would have been injured only by one predicate offense and not by the pattern of racketeering activity. Although it is not entirely clear, *Sedima* would appear to permit the selling shareholders to sue under RICO while *Bankers Trust* would not.

The *Bankers Trust* but-for test, applied to each element of the section 1962 violation, is contrary to the law of this circuit. In *Schacht* the plaintiffs' injuries resulted directly or indirectly from the defendants' alleged predicate fraud offenses. The primary victims of the defendants' scheme were the insurance company's creditors and policyholders. The alleged injuries resulted from the continued operation of the insolvent company, permission

for which was procured by fraud. The plaintiffs clearly alleged a pattern of racketeering activity, but the pattern itself, apart from the individual acts, was not a but-for cause of the injuries. That is, the alleged injuries were no more than the sum of the injuries resulting from each fraud in the pattern or series. Under *Bankers Trust*, RICO provides no remedy for such injuries resulting from only the individual acts of racketeering or the sum of the acts, and the Second Circuit would find no RICO claim in the *Schacht* situation.

In addition, in several other cases we have upheld RICO claims where the only apparent injuries were those directly resulting from the predicate offenses. *Sutliff, Inc. v. Donovan Companies, supra*, 727 F.2d at 653-54; *Bunker Ramo Corp. v. United Business Forms, Inc., supra*, 713 F.2d at 1287-88. Other circuits have done the same. *Alcorn County v. U.S. Interstate Supplies, Inc., supra*, 731 F.2d at 1169 (5th Cir.); *Bennett v. Berg, supra*, 685 F.2d at 1058-59 (8th Cir.). We adhere to our previous views and those of other circuits in rejecting the *Bankers Trust* but-for test as applied to each element of the RICO violation.

In addition, we note that by restricting civil RICO to such indirect injuries as those discussed in the opinion's examples, and by denying RICO claims for the injuries resulting from the extended pattern of racketeering activity in that case itself, *Bankers Trust* reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts. As Judge Cardamone stated in his dissent in *Bankers Trust*, " If civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." Slip op. at 5623.[15] The injuries for which RICO recovery was denied in *Bankers Trust* are not distinguishable in any meaningful way from those alleged in *Schacht, Sutliff Inc. v. Donovan Companies, Bunker Ramo,*

[15] It should be noted that the plaintiff in *Bankers Trust* had already proven a substantial portion of its allegations in other court proceedings.

Bennett v. Berg, or *Alcorn County*. We adhere to our prior decisions and those of other circuits, and we reject the Second Circuit's imposition of a racketeering injury requirement. We conclude that a civil RICO plaintiff need not allege or prove injury beyond any injury to business or property resulting from the underlying acts of racketeering. Plaintiffs' allegations of injury in this case—excessive interest charges resulting from defendants' alleged fraudulent scheme to overstate the prime rate—satisfy the requirements of 18 U.S.C. § 1964(c).

This holding by no means renders superfluous the requirement in section 1964(c) that the plaintiff be injured "by reason of" a violation of section 1962. As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.

Finally, it may be useful to other courts if we focus briefly on what we perceive to be the underlying conflict between *Schacht* and *Sedima*. The root of the conflict seems to lie in the fact that, in RICO, we confront a statute which is not ambiguous but which is, above all, deliberately and extraordinarily broad. There are some ambiguities, to be sure, but the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. *Cf. Sedima*, *supra*, slip op. at 5543-44.

In defining the key terms of the statute, such as "person," "enterprise," and "racketeering activity," and in leaving undefined such broad terms as "conduct" and "participate," Congress deliberately chose to employ broad terms which would defy judicial confinement. Judge

Oakes argues persuasively in *Sedima* that Congress might not have recognized all of the applications of the statute's broad language, particularly with respect to its civil provisions. Nevertheless, Congress still chose to employ that extraordinarily broad language in order to achieve its desired goals. In response to suggestions that the statute be more narrowly tailored to prevent unexpected applications, Congress clearly preferred breadth to precision. *Schacht*, *supra*, 711 F.2d at 1354-55; *Sutliff Inc.*, *supra*, 727 F.2d at 654.

Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or inartfully drafted. RICO may be very broad, but there was nothing careless about its drafting. When Congress deliberately chooses to unleash such a broad statute on the nation, in the absence of constitutional prohibitions, complaints must be directed to Congress rather than to the courts. *See Schacht*, *supra*, 711 F.2d at 1356.

With respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute. Nevertheless, it does not seem fitting for us to attempt to narrow the statute in ways which are nearly impossible to rationalize merely to exclude subjects of this kind. For to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention. Congress appears to have preferred a broad statute, even if overinclusion might result.

We do not believe we could limit RICO in the ways argued by the defendants or approved by the Second Circuit without disturbing the policy choices Congress has

made. If the safety or stability of the Republic demanded, we might be justified in pursuing such an aggressive jurisprudence. But, particularly at the pleading stage, we seem to be dealing with much smaller stakes—legal fees and the sensibilities of prominent defendants alleged to be "racketeers."[16] Those stakes do not appear high enough to justify our rejecting Congress's choice of a statute that sweeps broadly.

IV

Although the district court's dismissal of the complaint cannot be affirmed based on the elusive racketeering injury requirement, the defendants also contend that the dismissal is supported by other arguments not reached by the district court. These issues involve the necessary relationship between a person and an enterprise under 18 U.S.C. § 1962(c). The defendants correctly observe that we may reach these issues on appeal, at least where the arguments were presented to the district court and where the present record permits resolution of the issues.

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[16] A number of courts dismayed by civil RICO have commented on the *in terrorem* settlement value that the threat of treble damages may add to spurious claims. After all, the line between fraud and mistake or misunderstanding can be a very fine one. It is, therefore, important that, in the further development of civil RICO, criminal fraud be clearly distinguished from less egregious conduct. On the other side of the scales, however, is another phenomenon with which lawyers and courts are also familiar. The delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls. And, in any event, the choice between simple compensatory damages and treble damages, with whatever effect such a choice might have on the caseload of the federal courts, is for Congress to make.

Defendant ANB: ANB argues that it cannot be held liable under section 1962(c) in Count I because the requisite relationship between a person and an enterprise is not alleged. Plaintiffs offer two theories to support their RICO claims against ANB. First, they argue that ANB was both the "person" and the "enterprise" under section 1962(c) so that it conducted its own affairs through a pattern of racketeering activity. Second, they argue that ANB was the "person" conducting the affairs of its parent corporation, Heller International.

We turn first to the plaintiffs' contention that the same corporation may be both the liable "person" and the "enterprise" under section 1962(c). There is now a split in the circuits on this question. In *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983), the Eleventh Circuit held that the corporation at the center of a fraudulent scheme could be both the person and the enterprise under section 1962(c). The Fourth Circuit held precisely the opposite in *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).[17] Both cases were criminal RICO prosecutions, but the interpretations of 18 U.S.C. § 1962(c) are equally applicable to civil cases.

Discussion of whether the same corporation may be both the liable "person" and the "enterprise" under sec-

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[17] The Eighth Circuit appears to agree with the Fourth Circuit's conclusion that section 1962(c) requires an enterprise distinct from the person. *Bennett v. Berg*, *supra*, 685 F.2d at 1061-62 (affirming dismissal of count naming identical defendant and enterprise, but permitting amendment on remand); *Bennett v. Berg*, *supra*, 710 F.2d at 1364 & n.4 (en banc); *id*, at 1365 (McMillian, J., dissenting in part); *Alexander Grant & Co. v. Tiffany Industries*, *supra*, slip op. at 6 n.6 (*Bennett v. Berg* held count insufficient precisely because of possibility of identity of enterprise and person). The Ninth Circuit also recently followed *Computer Sciences* on the point. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

tion 1962(c) has proceeded at two levels—the statutory language and the policies of RICO, and we shall consider both.

In terms of the language, it is clear that a corporation can satisfy the definitions of both "person" and "enterprise" under section 1961. The court in *Hartley* found that there was nothing in the statutory language to prevent the same corporation from being both the liable person and the enterprise. 678 F.2d at 988. By contrast, the Fourth Circuit in *Computer Sciences* concluded that "'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish." 689 F.2d at 1190. Similarly, Judge Shadur concluded in *Parnes v. Heinhold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982), that section 1962(c) contemplates a separate "person" and "enterprise" because the enterprise may very well be the victim of the racketeering activity.

We are persuaded by the Fourth Circuit in *Computer Sciences* and by Judge Shadur in *Parnes* that section 1962(c) requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity. *See also Addis v. Moser*, No. 83 C 6118, slip op. at 9-11 (N.D. Ill. Feb. 15, 1984) (following *Parnes*). We do not doubt that a corporation may satisfy the section 1961 definitions of both "person" and "enterprise," as the court observed in *Hartley*. 678 F.2d at 988. But we focus our attention on the language in section 1962(c) requiring that the liable person be "employed by or associated with any enterprise" which affects interstate or foreign commerce. The use of the terms "employed by" and "associated with" appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear. Also, we do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits. *See* Pub. L. 91-452,

section 904, 84 Stat. 947. *Cf.* Blakey, *The Rico Civil Fraud Action in Context*, 58 NOTRE DAME LAW. 237, 324 n.181 (1982) (approving of *Hartley* and disapproving of *Computer Sciences*, relying in part on liberal construction clause).

The court in *Hartley* supported its reading of section 1962(c) by also arguing that there is, for RICO purposes, no significant difference between a corporation and an "association in fact," *see* 18 U.S.C. § 1961(4). The court said there should be no practical difference between a complaint or indictment naming a corporation as the enterprise and one naming an association in fact as the enterprise, with the corporation as a member of the association. 678 F.2d at 989-90. We agree that a corporation and an association in fact can both satisfy the "enterprise" requirement of section 1962(c). *See United States v. Turkette, supra*, 452 U.S. at 583. However, a corporation and an association in fact differ substantially with respect to the "person" element. Where persons associate "in fact" for criminal purposes, *see id.*, each person may be held liable under RICO for his, her or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity. But the nebulous association in fact does not itself fall within the RICO definition of "person." We doubt that an "association in fact" can, as such, hold any interest in property or even be brought into court. In the association in fact situation, each participant in the enterprise may be a "person" liable under RICO, but the association itself cannot be. By contrast, a corporation obviously qualifies as a "person" under RICO and may be subject to RICO liability. And it is not obvious that the problem can be resolved by merely alleging that the corporation and its employees constitute an association in fact. For these reasons, we are unpersuaded by the comparison to an association in fact.[18]

[18] We agree with the statement in *Hartley* concerning a corporation's responsibility for the acts of its agents. 689 F.2d

(Footnote continued on following page)

Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse—after all, when is the person truly an entity "distinct" or "separate" from the enterprise? We are therefore reluctant to base our conclusion on the statutory language without also examining the relevant policies and potential consequences of our conclusion.

At the policy level of the dispute, there are several significant competing arguments. The Eleventh Circuit argued in *Hartley* that where the defendant corporation is the central figure in a criminal scheme, as it was in that case, Congress could not have meant to let the central perpetrator escape RICO liability while subjecting only the sidekicks to RICO's severe penalties. 678 F.2d at 989. Similarly, plaintiffs here argue that Congress intended to make a "deep pocket" (in the person of the corporation) liable where corporate agents engage in a pattern of racketeering activity redounding to the benefit of the corporation. In *Parnes*, Judge Shadur argued that it would make little sense to hold a corporation liable under RICO for the misconduct of lower level employees, at least where it appears that the corporation is a passive instrument or even a victim of the racketeering activity. 548 F. Supp. at 23-24.

In our view, the RICO provisions have already taken into account these competing policies in different situations, and a careful parsing of section 1962 reveals a sensible balance among these policies. We find helpful here Professor Blakey's discussion in *The Rico Civil Fraud Action in Context*, *supra*, 58 NOTRE DAME LAW. at 307-25. Blakey points out that under the subsections of section

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[18] *continued*

at 988 n.43. However, as we discuss below, those concerns are better addressed in terms of subsection (a) of section 1962. The court in *Hartley* was apparently dealing only with subsection (c). There are significant differences between the two subsections, and we must analyze closely the terms of these carefully drafted provisions.

1962, the enterprise may play the various roles of victim, prize, instrument or perpetrator. The RICO liability of the enterprise should depend on the role played. In our view, the plaintiffs here and the court in *Hartley* are correct when they argue that the corporate enterprise should be liable where it is the perpetrator, or the central figure in the criminal scheme. In that situation, the corporate deep pocket should certainly be subject to RICO liability. At the same time, the defendants here and Judge Shadur in *Parnes* are surely correct in saying that the corporation-enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others.

In our view, the tensions between these policies may be resolved sensibly and in accord with the language of section 1962 by reading subsection (c) together with subsection (a). As we read subsection (c), the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator.[19] As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived

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[19] Section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal within the meaning of 18 U.S.C. § 2, and if the person uses the income in the establishment or *operation* of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.[20]

Applying this reading of subsection (c) to the complaint in this case, we conclude that ANB may not be held liable under section 1962(c) for conducting its own affairs through a pattern of racketeering activity. ANB might be held liable under section 1962(a) if it received the proceeds from the alleged racketeering activity and if it also could be held liable as a principal for those acts. However, plaintiffs here have abandoned any claim they might have stated under section 1962(a).[21]

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[20] Blakey argues that where the enterprise is an "instrument," it should be civilly, but not criminally, liable to third parties under RICO. 58 NOTRE DAME LAW. at 323-25. We see no statutory grounds for such a distinction between civil and criminal liability. *Cf. Bernstein v. Idt Corp.*, 582 F. Supp. 1079, 1082-84 (D. Del. 1984).

[21] Paragraph 19 of the complaint appears in part to track the language of section 1962(a), alleging that ANB violated section 1962 by using in the operation of ANB's business income from a pattern of racketeering activity. In this court the plaintiffs have argued only section 1962(c). Defendants suggested in their brief that plaintiffs had abandoned the section 1962(a) allegation, and plaintiffs have not responded to the suggestion. Plaintiffs have therefore abandoned the point.

Count I does not fail completely, however, for Count I also alleges that ANB violated section 1962(c) by conducting through a pattern of racketeering activity the affairs of its parent corporation, Heller International. That is a good allegation under section 1962(c). The subsection requires only some separate and distinct existence for the person and the enterprise, and a subsidiary corporation is certainly a legal entity distinct from its parent. Defendants do not challenge this point but argue only that the allegation does not adequately specify either the relationship between ANB and Heller International or the way in which ANB conducted or participated in Heller International's affairs. However, the complaint alleges that ANB is a wholly owned subsidiary of Heller International, and we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation.[22] We doubt that more detailed allegations on the subject would serve any useful purpose, and we see no reason to require them.

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[22] As the Supreme Court said recently:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2742 (1984). In *Copperweld* the Court held that a parent corporation and a wholly owned subsidiary are incapable of conspiring with one another for purposes of section 1 of the Sherman Act, 15 U.S.C. § 1. That holding does not extend to RICO's provisions in 18 U.S.C. § 1962(c) primarily because the Sherman Act is premised, as RICO is not, on the "basic distinction between concerted and independent action." *Copperweld*, 104 S. Ct. at 2740. The policy considerations discussed in *Copperweld*, 104 S. Ct. at 2740-44, therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity.

Defendants Grayheck and Heller International: Defendants also contend that the RICO claims against Grayheck and Heller International do not contain sufficiently specific allegations to withstand a motion to dismiss. In Count II of the amended complaint, plaintiffs seek to hold Grayheck and Heller International liable as persons conducting ANB's affairs through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c).[23] Defendants argue first that the complaint does not allege that Grayheck or Heller International acted with the requisite fraudulent intent. We reject this argument. The complaint is hardly a model of clarity on the intent issue, and it involves a lengthy trail of cross-references. However, at the end of the trail there are sufficient allegations of Grayheck's intent and Heller International's intent as embodied in its agents.

Defendants also raise a much broader point. They argue that the allegations in a civil RICO complaint must be as specific as a criminal bill of particulars and must establish probable cause to believe that the defendant committed the predicate racketeering offenses. Defendants rely on *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1045-46 (D. Utah 1983), which squarely supports their position. That court stated in relevant part:

> For a private civil action to lie, the plaintiff must have been injured by a "pattern of racketeering activity." Such a pattern is established by a showing that a party has committed at least two "indictable" acts. 18 U.S.C. § 1961(1) (Supp. 1982). A federal grand jury should return an indictment, only where there is probable cause or a reasonable probability that a crime has been committed. Thus, to properly plead an action under the treble damages provision of RICO, a party must allege two acts of "racketeering" with enough specificity to show there is probable cause the crimes were committed. An offense is not "indictable" merely because it is alleged. Rather, to be indictable it must be "well-founded" and based on probable cause.

558 F. Supp. at 1045 (citations omitted). The court also said:

> A private civil action under RICO is grounded upon the premise that a party has twice engaged in "racketeering activity." The Act defines "racketeering activity" as behavior "indictable" under specified provisions of the United States Code. Before a court can assess the merit of a plaintiff's treble damages claim it must determine whether there is probable cause to believe the named defendant committed the alleged predicate crimes. That determination is possible only if the factual basis of those "acts of racketeering" is set out with particularity. Thus, a factual statement similar to a bill of particulars is needed in pleadings that allege a violation of the RICO treble damages provision.

558 F. Supp. at 1045-46. *See also Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983) (complaint must show previous convictions or set out probable cause).

To establish its case at trial, a civil plaintiff must surely prove the acts of racketeering, but the district courts in *Bache Halsey* and *Taylor* appear to have moved that requirement up to the pleadings stage. For several reasons, we do not agree that such specificity is required *at the pleadings stage*.

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[23] The claim against Heller International is premised on the theory that Heller International acted through Grayheck, who is an officer and director of ANB, and perhaps through other unidentified persons. Heller International is alleged to have thereby conducted or participated in the conduct of ANB's affairs through the alleged pattern of racketeering activity. The terms "conduct" and "participate" in section 1962(c) are quite broad, but it is not obvious to us that they extend to a parent corporation's involvement in racketeering activity solely through the actions of an agent of a subsidiary corporation. However, since the defendants have not raised the point and the district court did not pass on it, we shall not consider it in this appeal as a possible basis for affirming a portion of the dismissal.

First, a determination of probable cause in the criminal context ordinarily involves some evaluation of the reliability of specific evidence. Even the most specific allegations do not establish probable cause unless they are reliable. We are, to say the least, perplexed as to how a court might undertake such evaluations of reliability in deciding a motion to dismiss under Rule 12. *See Sedima, supra*, slip op. at 5573 & n.56 (relationship between "probable cause" in complaint and plaintiff's burden at trial "remains something of a mystery").

With respect to *Bache Halsey*'s discussion of grand juries, it should be recalled that a grand jury has significant investigative powers and resources, including a broad subpoena power. Before it decides whether to indict a person, it has extensive opportunities to discover and evaluate relevant facts. It should be obvious that a civil plaintiff has no similar discovery rights until it files its complaint. Yet the approach of the district court in *Bache Halsey* appears to require a plaintiff to establish a case before any discovery is permitted. The *Bache Halsey* court argued that such specificity was needed in order to evaluate the merits of a claim and to distinguish between well-founded and frivolous claims. 558 F. Supp. at 1046. While the court's motives are admirable, its approach seems to us to be impractical. We see no grounds for demanding that a civil RICO plaintiff essentially plead evidence and prove the case in the complaint.[24]

Finally, we note that in our prior RICO decisions we have applied ordinary civil standards to pleadings in civil RICO cases. *E.g., Schacht v. Brown, supra*, 711 F.2d at 1352-53. We see no reason to depart from that practice.

It is possible that requiring private RICO plaintiffs to prove at trial the elements of a section 1962 violation

[24] Some of the district court's language in *Bache Halsey* suggests that the probable cause standard might apply only in a final decision to grant relief after trial. *See* 558 F. Supp. at 1045-47. However, the court relied on that standard to deny a party leave to amend its answer to include RICO counterclaims.

beyond a reasonable doubt could address some of the legitimate concerns about unfair stigmatization of defendants as "racketeers" and other abuses of RICO's criminal dimensions through civil proceedings. *See, e.g., Sedima, supra*, slip op. at 5569. RICO liability must be based, after all, on findings of criminal conduct. RICO does not specify a standard of proof for use in civil RICO actions. In the courts, the appropriate standards of proof in the various forms of civil RICO actions are not yet firmly settled, and the relevant considerations are numerous. *See Sedima, supra*, slip op. at 5569-74 & n.49; *id.* at 5584-86 (Cardamone, J., dissenting); *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978); Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, 53 TEX. L. REV. 1055, 1062-64 & n.52 (1975); Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, National Law Journal, Oct. 10, 1983, at 21, col. 1. *See also United States v. Spilotro*, 680 F.2d 612, 617-19 (9th Cir. 1982) (interlocutory orders under 18 U.S.C. § 1963(b)). On the appropriate standard of proof in proceedings with both civil and criminal dimensions, *see generally Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-91 (1983); *Addington v. Texas*, 441 U.S. 418 (1979); *United States v. Regan*, 232 U.S. 37, 48-49 (1914).

There can be little doubt that Fed. R. Civ. P. 9(b), which requires that allegations of fraud specify "with particularity" the circumstances of the alleged fraud, applies to fraud allegations in civil RICO complaints. *See Moss v. Morgan Stanley, Inc., supra*, 719 F.2d at 19. In this case, the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved. In addition, the identi-

fication of the transactions and the description of the alleged scheme to defraud put defendants on fair notice of the time and place of the alleged false representations. *See Thornton v. Evans*, 692 F.2d 1064, 1082 & n.41 (7th Cir. 1982); *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975). *See also McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228-29 (1st Cir. 1980); *Miscellaneous Service Workers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981); *Felton v. Walston & Co.*, 508 F.2d 577, 581-82 (2d Cir. 1974). There would have been little point in requiring plaintiffs to expand the complaint by also identifying each notice which included an interest rate. The complaint here therefore satisfies Rule 9(b).

For the foregoing reasons, we affirm the district court's dismissal of the portion of Count I alleging that ANB conducted its own affairs through a pattern of racketeering activity. We reverse the remainder of the district court's dismissal of the complaint and remand for further proceedings not inconsistent with this opinion.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—10-19-84—450

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

18 U.S.C. §§1961-1968

§1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186

(dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the

business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter.

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code,

to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed

under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant

from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upor a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the

Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness

and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violations.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such persons, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as a racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced

shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced,such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designated another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and

serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter each order or orders as may be required to carry into effect the provisions of this section.

In The

United States District Court

FOR THE
NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Plaintiffs,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Defendants.

NO. 83 C 1618—Judge Bernard M. Decker

AMENDED COMPLAINT

Plaintiffs, by their attorneys, for their complaint against defendants American National Bank and Trust Company of Chicago ("ANB"), Walter E. Heller International Corporation ("Heller") and Ronald J. Grayheck ("Grayheck") allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over Counts I and II under 18 U.S.C. §1964. This Court has jurisdiction over the remaining counts pursuant to the Court's pendent jurisdiction.

2. Venue lies in this district pursuant to 12 U.S.C. §94 and 18 U.S.C. §1965. The principal offices of defendants ANB and Heller are located in the Northern District of Illinois, all defendants transact their business and affairs in this district and defendants ANB and Heller have agents in this district. All of the wrongful conduct alleged herein occurred in this district.

PARTIES

3. Defendant ANB is a national bank which is engaged generally in the banking business. Defendant ANB's business includes the lending of money to individuals, corporations and other entities, at interest.

4. ANB is a national banking association which is capable of holding legal or beneficial interest in property. ANB is an enterprise engaged in interstate commerce and whose activities affect interstate commerce.

5. Heller is a corporation capable of holding a legal or beneficial interest in property. Heller is an enterprise engaged in interstate commerce and whose activities affect interstate commerce. That enterprise includes commercial banking, asset-based lending, mortgage banking, real estate financial services and the management of trusts. A substantial portion of Heller's commercial banking business is conducted through ANB. At all times described herein ANB has either been a wholly owned subsidiary of Heller or a wholly

owned subsidiary of American National Corporation which was a wholly owned subsidiary of Heller.

6. Defendant Grayheck is an officer and director of ANB. He and the other officers, employees and agents of ANB and Heller are persons capable of holding a legal or beneficial interest in property.

7. Plaintiffs are corporations which have offices at Chicago, Illinois.

COUNT I

8. Plaintiffs adopt and incorporate by reference paragraphs 1 through 7 of this Complaint.

9. Count I of this Complaint seeks damages against defendant ANB by reason of its violation of 18 U.S.C §1341, 18 U.S.C. §1961(1)(B) and 18 U.S.C. §1962.

10. Commencing in approximately February, 1979, plaintiff Haroco, Inc. borrowed money from ANB from time to time for which purpose it signed promissory notes which recited the rates of interest which it agreed to pay to ANB.

11. Included among the aforesaid loans and extensions thereof were the following:

February 15, 1979 — $500,000

March 19, 1979 — $200,000

April 25, 1979 — $200,000

May 16, 1979 — $500,000

May 24, 1979 — $1,300,000

August 20, 1979 — $200,000

August 22, 1979 — $1,300,000

12. Commencing in approximately May, 1980, plaintiffs Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co. jointly borrowed money from ANB from time to time for which purpose these plaintiffs signed promissory notes which recited the rates of interest which they agreed to pay to ANB.

13. Included among the aforesaid loans and extensions thereof were the following:

May 5, 1980 — $2,500,000

May 19, 1980 — $2,500,000

March 30, 1981 — $3,675,000

April 17, 1981 — $3,675,000

14. In each of the loans described in paragraphs 11 through 13 above the agreed rate of interest was stated as an increment over ANB's "prime rate", viz, "one per cent over the bank's prime rate". At all times described herein, as explicitly defined by ANB, ANB's prime rate of interest meant as follows:

> The rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans.

15. The acts and omissions of ANB alleged herein were committed by Grayheck and others of ANB's officers, agents and employees, each and all of whom were then acting within the scope of their duties and in the course of their employment at ANB. Each and all of those officers, agents and employees are "persons" within the meaning of 18 U.S.C. §1961(3). In each instance of wrongful conduct alleged herein, those persons were acting for the benefit of ANB and in furtherance of its purposes.

16. Prior to and at the time of those loans, ANB, then acting through the persons described at paragraph 15 herein,

devised and intended to devise a scheme and artifice to defraud plaintiffs and other borrowers, and a scheme and artifice to obtain money from plaintiffs and other borrowers by means of false or fraudulent pretenses, representations and promises, including the following:

> A. Falsely pretending, representing and promising to calculate interest based upon ANB's prime rate, when in fact ANB intended to declare and employ a basis in excess of its actual prime rate;
>
> B. Calculating, demanding and collecting interest from time to time based on ANB's declaration and use of a rate of interest in excess of its actual prime rate; and
>
> C. Concealing and suppressing ANB's actual prime rate. 17.

In furtherance of and in the course of the foregoing scheme and artifice, ANB knowingly used, caused to be used and anticipated the use of the United States Postal Service for delivery and receipt of (a) notices to borrowers of changes in interest rates and (b) payments of interest made to ANB by plaintiffs and other borrowers.

18. The aforesaid transactions, acts and practices of ANB occurred on many occasions subsequent to February 1979, at least two of which occurred within ten years of one another. The persons described in paragraph 15 of this Complaint thereby conducted, and participated in the conduct of, ANB's business and affairs through a pattern of racketeering activity. The aforesaid activities and conduct of ANB produced income for ANB which it used in the operation of its business, which is and was at all times relevant hereto, engaged in and affected interstate commerce.

19. By reason of the foregoing, defendants ANB, Grayheck and others of ANB's officers, agents and employees violated 18 U.S.C. §1962 by conducting and participating in

the conduct of ANB's affairs through a pattern of racketeering and by using the income derived therefrom in the operation of ANB's business.

20. ANB engaged in and implemented the foregoing scheme and artifice as part of ANB's participation in the Heller enterprise. ANB thus conducted, and participated in the conduct of, Heller's business and affairs through a pattern of racketeering activity.

CLASS ALLEGATIONS

21. Plaintiffs, and each of them, bring this action on behalf of themselves and all individuals, corporations, partnerships and other entities who borrowed money from ANB pursuant to notes or agreements that obligated ANB to charge interest at the "prime rate" or at a rate tied to the "prime rate":

A. which were entered into on or after ten years preceding the filing of the Complaint in this cause, and

B. under which ANB collected interest prior to the date of filing the Complaint in this cause, and

C. which resulted in ANB's charging and collecting interest at rates greater than specified in the notes or loan agreements by reason of ANB's misstatements of its prime rate or ANB's use of falsely inflated prime rates.

22. Class certification pursuant to Rule 23(b)(3), F.R.C.P., is appropriate because:

A. The requirements of Rule 23(a)(1) are satisfied in that there are thousands of class members.

B. There are questions of law and fact common to the claims of the plaintiffs and the absent class members.

These questions include: (i) whether ANB misrepresented its prime rate from time to time; (ii) whether ANB charged and collected interest from plaintiffs and the class members at rates based upon falsely inflated prime rates; and (iii) whether, as a result thereof, the defendant(s) named in this Count of the Complaint committed the violations alleged in this Count.

C. The claims of the plaintiffs are typical of the claims of the absent class members. Plaintiffs and each class member have an interest in establishing that ANB misrepresented the rate of interest it intended to charge and did charge and collect from plaintiffs and the class members and in establishing that ANB calculated and charged interest on a basis other than its actual prime rate.

D. The plaintiffs will fairly and adequately protect the interests of the class. None of the plaintiffs has an interest antagonistic to the interests of the absent class members. Plaintiffs' counsel are experienced in civil litigation and, in particular, in class actions.

E. The questions of law and fact applicable to the class members predominate over questions, if any, which might affect only individual members.

F. A class action would be superior to other available methods for the fair and efficient adjudication of this controversy.

23. Commencing at least as early as March, 1973 and continuing until the present, the defendant(s) named in this Count of the Complaint fraudulently concealed the scheme and pattern of conduct as aforesaid and concealed the actual prime rate of interest from the plaintiffs and the members of the class. During that period, plaintiffs and the class were not in a position to discover ANB's true prime rate, did not in fact

discover those facts and could not have done so in the exercise of diligence until April, 1981.

Wherefore, plaintiffs and the class pray for the following relief:

A. Judgment in favor of plaintiffs and the class members against defendant ANB for treble damages suffered by reason of the excessive interest paid by plaintiffs and the class members to ANB.

B. Their costs of suit and reasonable attorneys' fees pursuant to 18 U.S.C. §1964(c).

C. Such other and further relief as is just and appropriate.

COUNT II

24. Count II of this Complaint seeks damages against Defendants Heller and Grayheck by reason of their violation of 18 U.S.C. §1962 in connection with their participation in the conduct of ANB's business.

25. Plaintiffs adopt and incorporate by reference paragraphs 1-7, 10-14, 16-18 and 21-23 of this Complaint.

26. At all relevant times, various officers and directors of Heller were also officers and/or directors of ANB, and the said officers and directors of Heller and ANB and defendant Grayheck participated in the scheme, artifice and practices set forth in paragraphs 16 and 17 of this Complaint. Defendants Grayheck and Heller thereby conducted and participated in the conduct of ANB's affairs through a pattern of racketeering and have used the income derived therefrom in the conduct of ANB's business.

27. By reason of the foregoing, defendants Heller and Grayheck violated 18 U.S.C. §1962, by reason of which plaintiffs were charged and paid excessive amounts of interest on the loans.

Wherefore, plaintiffs and the class pray for the following relief:

A. Judgment in favor of plaintiffs and class members against defendants Heller and Grayheck for treble damages suffered by reason of the excessive interest paid by plaintiffs and the class members to ANB.

B. Their costs of suit and reasonable attorneys' fees pursuant to 18 U.S.C. §1964(c).

C. Such other and further relief as is just and appropriate.

COUNT III

28. Count III of this Complaint seeks damages and other relief against defendant ANB by reason of its breaches of contracts.

29. Plaintiffs adopt and incorporate by reference paragraphs 1-3 and 10-14 of this Complaint.

30. ANB committed breaches of its contracts with plaintiffs and the members of the class in that defendant ANB promised to calculate and charge interest at rates based upon ANB's prime rate, as defined, when in fact ANB calculated, charged and collected interest based upon rates in excess thereof.

31. Plaintiffs adopt and incorporate by reference paragraphs 21 and 22 of this Complaint.

32. Plaintiffs and the class have been damaged by paying to defendant interest in excess of the amounts agreed upon as aforesaid.

Wherefore, plaintiffs and the class pray for the following relief:

A. For judgment against ANB in the amount of their damages.

B. For an injunction commanding that ANB cease and desist from continuing to calculate, charge or collect from its borrowers excessive interest as alleged herein.

C. For an injunction commanding that ANB cease and desist from declaring that its prime rate is in excess of its true prime rate.

D. For their costs and reasonable attorneys' fee.

E. For such other and further relief as is just and appropriate.

COUNT IV

33. Count IV of this Complaint seeks damages and other relief against ANB for its violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (S.H.A. ch. 121½, §260 *et seq.*).

34. Plaintiffs adopt and incorporate by reference paragraphs 1-3, 10-16 and 21-23 of this Complaint.

35. ANB's business, generally, and in particular the acts and practices alleged herein, affected trade and commerce in the State of Illinois.

36. By virtue of the conduct alleged herein, defendant violated Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat., ch. 121½, 262 ("the Act").

Wherefore, plaintiffs and the class pray for the following relief:

A. For judgment against ANB in the amount of their damages.

B. For such other and further relief which this Court deems proper, including reasonable attorneys' fees and costs, pursuant to Section 10a of the Act, Ill. Rev. Stat., ch. 121½ 270a.

C. For an injunction commanding that ANB cease and desist from continuing to calculate, charge or collect from its borrowers excessive interest as alleged herein.

D. For an injunction commanding that ANB cease and desist from declaring that its prime rate is in excess of defendant's true prime.

COUNT V

37. Count V of this Complaint seeks damages and other relief against ANB for breaches of its fiduciary duties.

38. Plaintiffs adopt and incorporate by reference paragraphs 1-3, 10-16 and 21-23 of this Complaint.

39. It was agreed upon and understood that defendant ANB voluntarily undertook the obligation to calculate the agreed upon interest charges periodically due on the loans by plaintiffs and the class members and bill them accordingly. Defendant had exclusive knowledge of the rates of interest at which it made ninety-day unsecured commercial loans from time to time to its largest and most creditworthy commercial borrowers. Only defendant knew that the prime rate it employed to calculate interest under the agreements with plaintiffs and members of the class was in excess of its actual

prime rate. Plaintiffs and the class members relied on defendant to make interest calculations in good faith and pursuant to the understanding.

40. By virtue of the aforesaid undertaking, defendant had a fiduciary obligation to plaintiffs and the class members to determine honestly and precisely the correct interest rates and amounts due as interest.

41. Defendant knowingly and deliberately violated its fiduciary obligation to the plaintiffs and the class members by using a false and excessive prime rate in calculating interest, thus charging and collecting interest at rates higher than those agreed upon.

42. Plaintiffs and the class were damaged by defendant's breach of duty. Because defendant's conduct was fraudulent and intentional, punitive damages are necessary to punish defendant and serve as a deterrent to other prospective wrongdoers.

Wherefore, plaintiffs and the class pray for the following relief:

A. For judgment against defendant in the amount of their damages.

B. For an injunction commanding that defendant cease and desist from continuing to calculate, charge or collect from its borrowers excessive interest as alleged herein.

C. For an injunction commanding that defendant cease and desist from declaring, from time to time, that its prime rate is in excess of defendant's true prime rate.

D. For punitive damages in an appropriate amount, taking due account of the magnitude of defendant's wrongful conduct and defendant's financial circumstances.

E. For their costs and reasonable attorneys' fees.

F. For such other and further relief as is just and appropriate.

Dated: May 23, 1983

_____

Aram A. Hartunian

_____

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_____

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Attorneys for Plaintiffs

LIST OF PETITIONERS' PARENTS, SUBSIDIARIES AND AFFILIATES

American National Bank and Trust Company of Chicago's parent company is American National Corporation. On May 1, 1984 American National Corporation was acquired by First Chicago Corporation from Amerifin Corporation, formerly Walter E. Heller International Corporation. Subsidiaries and affiliates of American National Bank and Trust Company of Chicago are:

Amsub, Inc.;
American National Educational Corporation — California;
American National Educational Corporation — Delaware;
American National Overseas Corporation;
American National Safe Deposit Company;
ANBATCO Leasing;
ANBACO Servicing;
Tel-A-Data Corporation;
American National Bank of Arlington Heights;
American National Bank of Bensenville;
American National Bank of Libertyville.

Walter E. Heller International Corporation changed its name to Amerifin Corporation on January 26, 1984. Amerifin Corporation has no parent company, no subsidiaries and no affiliates.

Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS
CLERK

No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

vs.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

MEMORANDUM OF RESPONDENTS

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BEST AVAILABLE COPY

PARTIES TO THE ACTION

The identities of the Respondents are correctly identified in the Petition. They have no parents, subsidiaries and affiliates (except each other).

RESPONDENTS ACQUIESCE TO THE PETITION FOR A WRIT OF CERTIORARI

While Respondents disagree with Petitioners' statement of the Question Presented For Review,[1] Respondents agree with Petitioners that a writ of certiorari should be granted, in light of the conflict between the decision of the Seventh Circuit in this case and the decisions of the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 83-7965 (2d Cir. July 25, 1984), *petition for cert. filed,* (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co.* v. *Rhoades,* No. 83-7636 (2d Cir. July 26, 1984), *petition for cert. filed,* (U.S. Oct. 24, 1984) (No. 84-657); *Furman* v. *Cirrito* No. 84-7113 (2d Cir. July 27, 1984), *petition for cert. filed, sub nom. Joel* v. *Cirrito* (U.S. Oct. 15, 1984) (No. 84-604), and because of the public importance of the question presented.

Respectfully submitted,

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[1] Respondents believe that Petitioners' statement of the question is unduly contentious and therefore misleading. Neutrally stated, the Question for Review is: Whether a civil claim for damages under RICO requires proof of injury greater than or different from injury resulting from offenses that comprise a pattern of racketeering injury. (See the Seventh Circuit's statement of "the central issue," Petrs' Appendix at p.A-1.)

Office-Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*,

Petitioners,

v.

HAROCO, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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December 21, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

17pp

QUESTION PRESENTED FOR REVIEW

Whether the court below was correct in holding that the plaintiff's allegations of a cause of action under the Racketeer Influenced and Corrupt Organizations Act were sufficient to withstand a motion to dismiss.

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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-822

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*,

Petitioners,

v.

HAROCO, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge that the Court grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit. In that decision, the Court held that it was unnecessary for a

plaintiff to plead and prove any kind of special "racketeering injury" in order to show its entitlement to treble damages under the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"). It was sufficient for the plaintiff to plead and prove injury arising solely from the commission of two or more "predicate acts," i.e., individual acts of racketeering activities such as the alleged mail fraud in this case. The Court also held that the same entity could not be both a "person" and an "enterprise" within the meaning of the statute, but that a parent company and its subsidiary (if they are distinct legal entities) can fill both roles. Finally, the Court held that the degree of specificity expected in a criminal RICO bill of particulars is not required at the pleadings stage in a civil RICO case. In each respect, the Court acted inconsistently with the reported decisions of other United States courts.

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. Its membership comprises approximately 90% of all American banks, and ABA member banks are located in each of the fifty states and the District of Columbia. This case involves a civil claim that a commercial bank violates the Racketeer Influenced and Corrupt Organizations Act when it lends money at an interest rate tied to the "prime rate" while at the same time making loans to other borrowers "below prime." Other commercial banks have been targets in suits with similar allegations in at least fifteen states, located in at least ten of the circuits. Commercial banks have also appeared as plaintiffs in civil lawsuits charging violations of the RICO statute. *See, e.g., Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984)(No. 84-657).

As more fully appears below, there is considerable conflict among the circuits, and among federal district courts, over a variety of issues involved in the interpretation and application of RICO. This conflict and the resulting confusion has a direct, immediate and serious impact upon a large segment of our memership. As a representative of the industry, the American Bankers Association believes it is well positioned to describe and discuss the issues raised in this case from a different and unique perspective.

SUMMARY OF THE ARGUMENT

The decisions of the Seventh Circuit in this case, and of the Second Circuit in the other civil RICO cases now pending before the Court on petitions for writs of certiorari present a classic case of a dispute among the circuits for which the Supreme Court ought to grant review under Rule 17.1(a) of the Supreme Court Rules. The conflict among the circuits is not limited to a single point of law, but rather to three or four distinct differences among the courts over the interpretation of the same law. They are disputes which are irreconcilable and which defy solution in the absence of a definitive judgment from this Court. In addition, litigation under the civil provisions of RICO is not a remote or specialized area of the law, having little relevance or interest to the lower courts or the bar. To the contrary, there has been a veritable explosion of civil RICO litigation in the past few years, with a great many cases still pending before trial or appellate courts at one stage or another. The courts and the bar need definitive guidance on how to resolve the many complicated issues arising from such litigation. While the Supreme Court has rendered decisions on the criminal aspects of the law, it has not yet

had occasion to deal with the civil provisions of RICO. The issues raised by this case are thus important issues of federal law which ought to be settled by the Supreme Court under Rule 17.1(c) of the Supreme Court Rules.

ARGUMENT

I

Decisions of the U.S. Courts of Appeals interpreting the civil liability sections of the Racketeer Influenced and Corrupt Organizations Act are irreconcilable.

The Racketeer Influenced and Corrupt Organizations Act provides in relevant part that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." (18 U.S.C. § 1964(c)(1970)) (emphasis added). Section 1962, in turn, makes it unlawful for a *person* who has engaged in a pattern of racketeering activity to take part in the ownership, control, establishment, operation or participation in the conduct of the affairs of an *enterprise* engaged in or affecting interstate commerce. "Racketeering activity" is defined in Section 1961(1) as the commission of any of a series of criminal acts *chargeable* under state law and punishable by imprisonment for more than one year or any act which is *indictable* under various federal criminal statutes, including mail fraud and wire fraud. A "pattern" is the commission of two such acts within ten years of one another (18 U.S.C. § 1961(5)(1970)).

The statute immediately raises several questions of interpretation, which have received differing answers from the courts. First of all, how shall the words "by

reason of" be construed? A plaintiff is entitled to treble damages if he is injured by reason of a violation of the section of the law which prohibits a pattern of racketeering activity, not the commission of the specific offenses themselves which together make up the pattern since those are prohibited elsewhere. In this case, the Seventh Circuit has held that injury arising from the commission of two or more of the so-called predicate acts constitutes injury by reason of a violation of Section 1962, and that there is no need for the plaintiff to establish some sort of injury above and beyond the injury attributable solely to the commission of the predicate acts. *Haroco Inc. v. American National Bank & Trust Co.*, No. 83-2529, slip op. at 17 (7th Cir. Oct. 19, 1984). In this determination, the Seventh Circuit expressed its substantial agreement with the Fifth Circuit (*Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984)), and its disagreement with the conclusions of the Second Circuit in the *Sedima* trilogy (*Sedima S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 494 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984), *petition for cert. filed, sub nom. Joel v. Cirrito*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604). The Second Circuit, on the other hand, construes the "by reason of" language as

> a way to limit standing to sue under RICO to people hurt by an injury of the type RICO was intended to prevent. RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized

> criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

Sedima, 741 F.2d at 494 (footnote omitted).

A second question of interpretation is whether the same corporation can at the same time be both a "person" who engages in racketeering activity and the "enterprise" controlled, owned or operated by the liable "person." In this case, the Seventh Circuit, agreeing with the Fourth Circuit's opinion in *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), held "that section 1962(c) requires separate entities as the liable person and the enterprise which has its affairs conducted through the pattern of racketeering activity." *Haroco*, slip op. at 32. In reaching this conclusion, the court acknowledges its disagreement with the Eleventh Circuit opinion in *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). The Seventh Circuit reasoned that when Congress used the terms "employed by" and "associated with" in the statute, it clearly contemplated that a "person" would be separate and distinct from the "enterprise." The Eleventh Circuit, on the other hand, maintained that there is little, if any, practical difference between a corporation and an "association" which clearly can serve in both roles. Moreover, the Eleventh Circuit relied upon the liberal construction clause of the statute in order to reach its conclusion, since it thought that construction was necessary to effectuate the objects of the law. Congress could not have intended to allow a corporation to escape liability under RICO by hiding behind its

corporate form where it is the central figure in a criminal scheme. *Hartley*, 678 F.2d at 989.

A subsidiary question under the person/enterprise problem is whether a corporation and its parent or subsidiary or affiliated corporation constitute sufficiently separate and distinct entities so that one may satisfy the "person" requirement and the other the "enterprise" requirement of RICO. In this case, American National Bank is alleged to be the "person," conducting, through a pattern of racketeering activity, the affairs of its parent corporation, Heller International. The Seventh Circuit held that "[t]hat is a good allegation under section 1962(c)." *Haroco*, slip op. at 37. In so holding, the court acknowledged a recent decision of this Court in which it was held that a parent and a wholly owned subsidiary are incapable of conspiring with one another for purposes of the antitrust laws. *Copperweld Corporation v. Independence Tube Corp.*, 104 S.Ct. 2731, 2742 (1984). Nevertheless, the *Haroco* court attempts to distinguish away the precedent, claiming that it does not extend to RICO because of different premises behind RICO and the antitrust laws.

The next question of statutory construction raised by RICO in this case concerns the degree of specificity with which a plaintiff must allege the commission of the "predicate offenses." This is a civil action for damages, and under ordinary circumstances the liberal rules of "notice" pleading would be applicable rather than the more stringent requirements for pleading criminal charges. But RICO is not an ordinary civil claim. The law specifically defines the racketeering activity for which a defendant may be held liable as the commission of two or more acts *chargeable* or *indictable* under state or federal law. One cannot very well be charged or indicted on the kind

of generalities which would be allowed in normal civil litigation. At least two U.S. District Courts have held that the use of this terminology in the statute requires that the plaintiff must plead the predicate acts of racketeering with enough specificity to show that there is probable cause to believe the crimes were committed. *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1045 (D. Utah 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983). Nevertheless, the Seventh Circuit rejected this reasoning as impractical in the case below. *Haroco*, slip op. at 40. A civil plaintiff, at the time of the filing of the complaint, prior to discovery, does not have available to him the same amount of evidence and information normally available to a grand jury before it returns an indictment in a criminal case, and a mere complaint, no matter how specifically pleaded, cannot very well establish "probable cause."

A subsidiary question arising under the specificity problem is whether or not the plaintiff in a civil RICO action must plead and prove prior convictions for the predicate offenses. The Second Circuit so held in *Sedima*, 741 F.2d at 496. The Seventh Circuit has previously held that prior criminal convictions for underlying offenses is not a prerequisite for a civil RICO action. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983). In *Haroco*, the court states that "[t]he issue is not presented in this appeal." Slip op. at 18, n. 12. Nevertheless, the court has remanded the case to the district court for further proceedings upon a complaint in which prior convictions of the defendants are not alleged. *See* Petition for Writ of Certiorari A-57—A-69. In light of the *Sedima* decision, that possible deficiency is certain to become an issue before the

district court. Considerations of judicial economy ought to dictate that this issue be resolved with all the others, since the development of a record below would not in any way affect the resolution of such a purely legal question.

In summary of this point, it is clear that the United States Courts of Appeals and the Federal District Courts have divided seriously on a great number of statutory construction issues surrounding the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act. The resulting confusion demands resolution which can only come from the United States Supreme Court, and the petition for writ of certiorari should be granted in order to restore order to this field of the law.

II

The proper construction of the Racketeer Influenced and Corrupt Organizations Act is an important issue of federal law which has not been decided by this Court but should be.

On two occasions, this Court has addressed the criminal aspects of the Racketeer Influenced and Corrupt Organizations Act, *Russello v. United States*, 104 S. Ct. 296 (1983); *United States v. Turkette*, 452 U.S. 576 (1980); but has yet to address the civil aspects of the law. As indicated in the preceding section of this brief, there are, or may be, differences in the interpretation or application of the statute based upon some fundamental differences between civil and criminal litigation. Consequently, this Court's criminal RICO decisions do not necessarily address the issues raised in the context of this case.

Aside from the sheer volume of recent civil RICO cases, and the impact upon the industry we represent, to

which we earlier alluded, and aside from the inconsistent decisions among the circuits, the interpretation of the civil provisions of RICO presents an important question of federal law in its own right.

We respectfully submit that it is essential to arrive at some sensible reconciliation between legislative intent and the language used in the law where Congress has clearly expressed a limited intent, and then painted with a broad brush. That is the case with civil RICO.

Contenders in opposing judicial camps profess to be relying upon the "plain meaning of the statute" in the exegesis they have performed, *Bankers Trust Co. v. Rhoades*, 741 F.2d at 517; *Furman v. Cirrito*, 741 F.2d at 528, and yet they reach diametrically opposed results, neither of which seem entirely satisfactory. If those courts, such as the Seventh Circuit here, are correct in holding that there is no requirement of a special "racketeering injury" above and beyond injury stemming solely from the commission of the predicate offenses, then the effect will be to federalize virtually every kind of fraud, which is normally compensable under state common law anyway, and to impose upon those who have committed simple fraud the treble damages and attorney's fee awards called for by the statute. That could hardly have been the intent of Congress in enacting a law specifically aimed at "eradicating organized crime from the social fabric." *United States v. Turkette*, 452 U.S. at 585. (*See also Russello v. United States*, 104 S. Ct. at 302-03; Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970)). The Seventh Circuit acknowledges as much:

> [I]t does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

Haroco, slip op. at 29.

On the other hand, if those courts, such as the Second Circuit in the *Sedima* trilogy, are correct in requiring a prior criminal conviction or an ill-defined special racketeering injury as a prerequisite to a civil RICO action, then the statute is entirely gutted. It has little or no meaning or impact, even upon organized crime. *Bankers Trust Co. v. Rhoades*, 741 F.2d at 522-23 (Cardamone, J., dissenting). That also could not have been the intent of Congress. (The only cure for this may be to develop a workable definition of "special racketeering injury.")

Yet if the "plain meaning of the statute" yields no workable answer to the issues raised by the civil RICO cases, the legislative history proves an equally unsatisfactory point of departure. Very nearly the only way in which the intent of Congress, in dealing with "organized crime," can be carried out under this statute is for the courts to require proof of some nexus between the defendant and what is commonly conceived of as "organized crime"—La Cosa Nostra, the Mafia, and so forth. However, virtually all of the courts which have considered this approach have rejected it, and correctly so. See cases collected in Note, *Prime Rate Fraud Under RICO*, 72 Georgetown L.J. 1885, 1894 n. 71 (1984). Such a requirement would do violence to the language of the statute, present insuperable problems of definition, and create the constitutional difficulties endemic to any type of "status crime" legislation. Yet at the same time, the Second Circuit is entirely correct in stating that there is nothing whatsoever in the legislative history of RICO which indicates an intent on the part of Congress to brand "such respected and legitimate 'enterprises' as the American Express Company,

E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch . . . as 'racketeers.'" *Sedima*, 741 F.2d at 487.

It is beyond the scope of this brief for the American Bankers Association to suggest where the line might be drawn in this important and confusing matter. We simply offer the foregoing to show that the line must be drawn, and that at this point it is only the Supreme Court which can draw it. The petition for writ of certiorari should be granted in order to do so.

CONCLUSION

For all of the reasons stated herein, the American Bankers Association as amicus curiae hereby respectfully urges the Court to grant the petition.

Respectfully submitted,

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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *et al.*,

Petitioners,

v.

HAROCO, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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---

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.*

(Petitioners have consented to the filing of this brief, and a copy of their consent is on file in the Clerk's Office. Respondents have refused to consent to the filing.)

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association ("ABA") is the largest national trade association of the commercial banking industry in the United States. Its membership includes the vast majority of commercial banks, holding an estimated 95% of domestic assets of all American commercial banks. ABA member banks are located in each of the fifty states and the District of Columbia and include banks chartered by the United States and those chartered by their respective states.

This case involves a civil claim that a commercial bank violates the Racketeer Influenced and Corrupt Organizations Act when it lends money at an interest rate tied to the "prime rate," while at the same time making loans to other borrowers "below prime" (other elements of the statute being satisfied). It is one of a plethora of similar suits filed against commercial banks in at least fifteen states. Since RICO provides for treble damages, costs and attorneys fees, a decision by this Court which allows plaintiffs to turn an ordinary, run-of-the-mill, business dispute into a federal "racketeering" case would be seriously harmful to the industry. At the same time, commercial banks have appeared as plaintiffs in civil cases alleging violations of RICO under circumstances where it is apparent that a true pattern of racketeering activities is involved. An unduly restrictive decision by this Court pertaining to the scope of the RICO remedy would likewise be harmful to the victims of the kind of injury Congress sought to prevent by enactment of the statute.

WHEREFORE, it is respectfully requested that the Court grant leave to the American Bankers Association to file the attached Brief as *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the court below was correct in holding that the plaintiff's allegations of a cause of action under the Racketeer Influenced and Corrupt Organizations Act were sufficient to withstand a motion to dismiss.

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The American Bankers Association respectfully submits this brief as amicus curiae, to urge the Court to so construe the Racketeer Influenced and Corrupt Organizations Act as to preserve its remedial provisions for victims of true racketeering activities, while not permitting use of the law beyond the manifest intent of Congress. The case at hand, involving a member bank of the American Bankers Association, is an unfortunately typical example of a case in which

plaintiffs seek to recover treble damages, costs and attorneys fees for actions of the bank which Congress never intended to prohibit by its enactment of RICO. Even while upholding the claim in this case, the Seventh Circuit acknowledged as much:

> [I]t does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute.

Haroco v. *American National Bank & Trust Co.*, 747 F.2d 384, 399 (1984).

Even though it seems unlikely and may be inappropriate for interest calculations to be subject to litigation under RICO, the fact of the matter is that ABA member banks have been named defendants in cases similar to this one in at least fifteen states. As here, the claims typically allege that the defendant commercial bank has loaned money to the plaintiffs at an interest rate tied to the "prime rate," that "prime rate" is the lowest rate available to the bank's most creditworthy customers, that the bank has made loans to other customers at an interest rate lower than the published "prime rate," thus making the published "prime rate" false and fraudulent. It is further alleged in the typical case that the bank furthered the "fraudulent" scheme by using the United States mails on two or more occasions to send billing statements to the plaintiffs. This, then, is claimed to constitute "mail fraud" within the meaning of 18 U.S.C. § 1341 and the necessary predicate acts for "racketeering activity" under 18 U.S.C. § 1961(1).

The concept of a "prime rate" is considerably more complicated than the simplistic understanding of it which RICO plaintiffs seem to exhibit;[1] it is standard banking practice in modern times to tie the interest rate actually charged to a particular customer to a "prime rate"; and it is not unusual—or fraudulent—to charge certain customers an interest rate less than the announced "prime rate" where other terms and conditions of a particular loan sufficiently distinguish that loan from the type of loan for which the "prime rate" is set.[2] It simply belies common sense and corrupts the language to maintain that reasonably normal banking practice constitutes "racketeering activity."

The simple solution to the prime rate/RICO problem would be for us to urge this Court to adopt the reasoning of the Second Circuit in *Sedima S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482, 496 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648), and hold that a plaintiff must plead and prove two or more convictions of the defendant for mail fraud or any of the other predicate offenses, in order to state a claim for relief under RICO. While such a

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[1] *See* G. Fischer, *The Prime: Myth and Reality*, 93-105 (1982).

[2] In this case, by way of example, the bank is alleged to define "prime rate" as "[t]he rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans." (Complaint, ¶ 14). If the "prime rate" at a particular time happened to be 12%, a *secured* loan made at 11% or a *six-month* loan made at 11.5%, or a *non*-commercial mortgage loan made at 10.5% would not be loans made "below prime." They would simply be loans made at appropriate interest rates for the particular class to which they belonged, wholly unrelated to the appropriate rate or rates for other classes of loans—such as 90-day unsecured commercial loans.

conclusion can be justified by the plain words of the statute, as the Second Circuit does, that conclusion would render the statute virtually meaningless and deprive victims of true racketeering activity of the protections and remedies Congress intended for them. A good example of this problem is *Bankers Trust Co.* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657) in which the defendants are alleged to have committed bankruptcy fraud, perjury, and bribery of a state court judge—certainly not run-of-the-mill business practices in any event. As dissenting Judge Cardamone stated, "[i]f civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." *Bankers Trust Co.* v. *Rhoades,* 741 F.2d at 518 (Cardamone, J., dissenting).

Thus, members of the banking industry have legitimate interests on both sides of the issues presented by this case. As a representative of that industry, the American Bankers Association believes it is equipped to suggest a dividing line between the kind of cases RICO was intended to cover and those it was not, based upon the construction of the words "by reason of" appearing in the statute and by a discussion of the need for separate entities to satisfy the "person" and "enterprise" elements of the statute.[3]

---

[3] There is another statutory construction issue involved in this case, which we believe should be resolved by the Supreme Court as well, but the focus of this brief shall be primarily upon these two problems. The other issue is the degree of specificity with which a plaintiff must allege a RICO violation. Some courts have held RICO plaintiffs to the same test of specificity as would be required for a criminal bill of particulars. (*See, e.g., Bache Halsey Stuart Shields Inc.* v. *Tracy Collins Bank & Trust Co.,* 558 F. Supp. 1042, 1045 (D. Utah. 1983).) Here, the Seventh Circuit held that a RICO allegation (at least where a form of "fraud" constitutes the predicate offenses) must satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *Haroco,* 747 F.2d at 404-405. We believe that that is the proper test but do not agree with the court that the test was satisfied in this case. The rule requires that the circumstances constituting fraud shall be stated with particularity. Here there are simply no allegations as to the identity of persons to whom "below prime" loans were made, what rates were charged on those loans, the amounts of alleged overcharges, and so forth. Such vague allegations fail to satisfy the specificity requirements of Rule 9(b). *See Bennett* v. *Berg,* 685 F.2d 1053, 1062 (8th Cir. 1982), *on reh'g,* 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied,* 459 U.S. 527 (1983).

SUMMARY OF THE ARGUMENT

Certiorari was granted in this case and in *Sedima* no doubt in order to resolve an irreconcilable conflict between the Second and Seventh Circuits over the proper construction of the Racketeer Influenced and Corrupt Organizations Act. Neither of the two decisions represent a satisfactory answer to the statutory construction problems presented by the law. If the Seventh Circuit's reasoning is followed, far more claims will be permitted to be filed under the statute than Congress ever intended; if the Second Circuit's reasoning is followed, few, if any, claims will be permitted under the statute, and Congress could not have intended that result either.

In construing the statute, the Supreme Court should consider the nature of the activity for which Congress sought to provide a cause of action, rather than the nature of the injury resulting from alleged racketeering activities, as the lower courts have done. Concentrating on the activity rather than the injury, which

is fully consonant with the statute, will enable courts and juries in the future to draw the necessary fine line between real RICO violations and ordinary, garden variety fraud which, although compensable under state common law or other state or federal statutes, does not rise to the level of a RICO violation.

ARGUMENT

The Racketeer Influenced And Corrupt Organizations Act Provides A Remedy Only To Those Who Suffer Injury Caused By An Activity The Law Was Designed To Deter

A. *The "By Reason Of" Requirement*

The Racketeer Influenced and Corrupt Organizations Act provides in relevant part that "[a]ny person injured in his business or property *by reason of* a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." (18 U.S.C. § 1964(c) (1970)) (emphasis added). Section 1962, in turn, makes it unlawful for a *person* who has engaged in a pattern of racketeering activity to take part in the ownership, control, establishment, operation or participation in the conduct of the affairs of an *enterprise* engaged in or affecting interstate commerce. "Racketeering activity" is defined in Section 1961(1) as the commission of any of a series of criminal acts chargeable under state law and punishable by imprisonment for more than one year or any act which is indictable under various federal criminal statutes, including mail fraud and wire fraud. A "pattern" requires at least the commission of two such acts within ten years of one another (18 U.S.C. § 1961(5) (1970)).

It is obvious from a reading of the statute's plain words that RICO does not prohibit, or provide a remedy for, commission of the so-called "predicate acts." Mail fraud, wire fraud, state law felonies, and so forth, are prohibited by other pre-existing sections of federal or state law. By its own terms, RICO prohibits a *pattern* of racketeering activity and limits the damage remedy to those who are injured by this *pattern* and can satisfy the other elements of the statute. In the Second Circuit case now before this Court for review, Judge Oakes wrote that

> RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by the predicate acts as are alleged here.

Sedima, 741 F.2d at 494 (footnote omitted).

This construction of the words, "by reason of," is consistent with the Supreme Court's construction of the same words appearing in Section 4 of the Clayton Act, 15 U.S.C. § 15, which grants a treble damage remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977), this Court held that the Clayton Act remedy was designed to recompense "injury of the type the antitrust laws were intended to prevent." Similarly in this case, the treble damages of RICO should be available to those

who suffer injury of the type RICO was intended to prevent.

In this case, however, the Seventh Circuit held that injury arising from the commission of two or more of the predicate acts, standing alone, constitutes injury by reason of a violation of Section 1962, and that there is no need for a plaintiff to plead and prove some sort of special racketeering injury above and beyond the injury caused by the predicate acts. *Haroco,* 747 F.2d at 393. In reaching that conclusion, the court took strenuous issue with the Second Circuit's efforts to define the special racketeering injury that it requires plaintiffs to plead and prove. The Seventh Circuit calls it an "elusive racketeering injury requirement" *Id.* at 399, and argues that the Second Circuit's hypothetical examples of injuries attributable to a pattern, but not to individual predicate acts, are "inconsistent with the rest of the opinion." *Id.* at 397. The Seventh Circuit's criticism of the Second is well-taken in this instance.

We think that both courts have focused on the wrong aspect of the language in the statute pertaining to injury caused by reason of a pattern of racketeering activity. We suggest that it is not the nature of the *injury* which plaintiffs either must or need not claim to be "special" in any sense. In some cases, injury stemming solely from the commission of predicate acts should be enough to warrant recovery under RICO; in other cases, such injuries should not be sufficient to award treble damages. What is the more appropriate aspect of the law to consider is rather the nature of the *activity* which causes injury. We urge the Court to hold that plaintiffs must plead and prove that the activity involved is a "special" racketeering activity.

By this, we do not mean to suggest that plaintiffs must plead and prove that the defendant is a member of some recognized organized criminal group. The type of activities for which Congress intended to provide recompense under RICO are those which are "characteristic of organized crime," whether or not actually committed by organized crime figures. S. Rep. No. 617, 91st Cong., 1st Sess. 34 (1969); McClellan, *The Organized Crime Act, (S.30) or its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame Law. 55, 142 (1970).

Focusing on the nature of the activity rather than on the nature of the injury would lead to the conclusion that there will be instances in which the commission of two or more acts of "mail fraud" will constitute a compensable RICO violation where the facts show that the mail fraud was committed in a fashion one would expect of true racketeers, whereas in other cases two or more acts of "mail fraud" would not add up to a RICO violation where the facts show little more than a garden variety misstatement of fact communicated through the mails in the course of an ordinary business transaction.[4]

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[4] Here again, we do not mean to excuse the commission of fraud in ordinary business transactions. A plaintiff able to plead and prove such a fraud should be entitled to recover damages for any losses incurred as a result. And, of course, such a plaintiff is entitled to recover damages for fraud under state common law. The issue in this case is whether Congress intended to federalize virtually all forms of state common law fraud actions and to award to plaintiffs treble damages for garden variety fraud. It is impossible to read such a Congressional intent into a statute whose stated purpose is "eradicating organized crime from the social fabric." *United States* v. *Turkette,* 452 U.S. 576, 585 (1980).

The approach we suggest here is consistent with the plain language of the statute. As indicated above, RICO does not prohibit the listed predicate acts; it prohibits a *pattern* of racketeering activity. Section 1961(5) says that a " 'pattern of racketeering activity' requires *at least* two acts of racketeering activity." (Emphasis added.) The statute does *not* say that a pattern *means* two acts of racketeering; it does *not* say that two acts of racketeering activity will always suffice; nor does it say that *only* acts are required. More may be required under the facts of a particular case. An analogous definitional problem with which the banking industry is quite familiar arises under the McFadden Act, which limits the ability of National banks to establish branches only to the extent that a state-chartered bank in the same state could establish branches. The law provides (12 U.S.C. § 36(f)) that the term "branch" "shall be held to include any . . . branch place of business . . . at which deposits are received, or checks paid, or money lent." Several cases have arisen in which it is claimed that a national bank's separate facility is a "branch" even though it does not perform any of the three listed functions. *E.g., St. Louis County National Bank* v. *Mercantile Trust Co. National Association,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977); *Securities Industry Association* v. *Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983), *appeal docketed,* No. 84-5026 (D.C. Cir. Jan. 18, 1984). This Court, in construing the McFadden Act, has held that the performance of the three listed functions, or any of them, "defines the *minimum* content of the term 'branch'. . . . [I]t may include more." *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122, 135 (1969) (emphasis

supplied). So too in this case, the statutory description of the "pattern of racketeering activity" defines the minimum content of the term. In short, if the plaintiff is unable to plead or prove the commission of two predicate acts, there is no valid RICO claim. But even if a plaintiff *can* plead and prove two predicate acts, that may or may not suffice, depending upon the facts of a particular case. The term "may include more."

There still remains the question of how to draw a dividing line between those cases in which proof of the commission of two predicate acts, without more, shall suffice to constitute a RICO violation and those in which proof of something above and beyond the mere predicate acts will be required.

Perhaps the judge who wrote that "[c]ourts recognize a racketeering enterprise injury when they see it"[5] came closest to the answer. This is, as the judge acknowledged, a paraphrase of Justice Stewart's famous comment on the problems of defining "hard core pornography." *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In pornography cases, branch banking cases, negligence cases, cases involving application of the "prudent man rule," and in many other areas of the law, there are not firm and fixed definitions which answer all possible questions. In these cases, the courts impose a "facts and circumstances" test. In pornography cases, for example, the test is whether the average person, applying contem-

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[5] *Willamette Savings & Loan* v. *Blake & Neal Finance Company,* 577 F. Supp. 1415, 1430 (D. Or. 1984). *See also Waste Recovery Corp.* v. *Mahler,* 566 F. Supp. 1416, 1468-69 (S.D.N.Y. 1983).

porary community standards, would find that the work, taken as a whole, appeals to the prurient interests, is presented in a patently offensive manner, and is without serious literary, artistic, political or scientific value. *Miller* v. *California,* 413 U.S. 15, 24 (1973). (*See also Ginzburg* v. *United States,* 383 U.S. 463 (1966), in which it was held that the circumstances of presentation of an allegedly obscene work were relevant in determining whether claims of redeeming social value were pretense or reality.) In "prudent man" cases, the rule is that a trustee should conduct himself on behalf of settlors and beneficiaries in the manner that men of prudence, discretion and intelligence manage their own affairs. *Harvard College* v. *Amory,* 9 Pick. 446, 461 (Mass. 1830). RICO cases ought not be any different. We know from the legislative history that Congress intended there to be a civil remedy for activities which are characteristic of organized crime. A court, as finder of fact, or a jury, under proper instructions, certainly ought to be able to determine, after a trial (or on motion for summary judgment) whether the acts alleged were actually committed by the defendant and, if so, whether those particular acts were of such a nature as to be characteristic of organized crime—even if committed by a defendant with no real connection to a recognized criminal organization. We already expect fact finders to determine how prudent men conduct themselves and whether a particular defendant met that standard; it cannot be any more difficult to expect a fact finder to determine how a gangster would conduct himself and whether the particular defendant met *that* standard. We already expect fact finders to decide what are contemporary community standards, and what is patently offensive under those standards. It cannot be

any less reasonable to ask that a fact finder determine whether a particular activity so far exceeds the community norm for doing business as to be classified as a racketeering activity rather than as simple garden variety fraud.

We could not here begin to suggest all of the possible forms of mail fraud or wire fraud which could ever be committed, and try to classify each of them into RICO and non-RICO categories. But perhaps one or two examples will suffice to demonstrate the point. We believe, for example, that the approach we suggest could satisfy Judge Cardamone's concern in the *Bankers Trust* case. It is, no doubt, correct to say that there is no special racketeering "injury" in *Bankers Trust,* as defined by the Second Circuit. However, we believe that a judge or a jury could well find, under the "facts of this totally outrageous case" that there was a special racketeering *activity* involved. The approach we suggest should also satisfy the concerns of the Second Circuit majority that "such respected and legitimate 'enterprises' as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearnes & Co., and Merrill Lynch . . . [not be] labeled as 'racketeers.' " (*Sedima,* 741 F.2d at 482). Even if a judge or a jury were to conclude that "mail fraud" or "wire fraud" had, in fact been technically committed by such a company in the context of an otherwise entirely legitimate business transaction, the judge or jury could well find that the offenses did not, under the circumstances, rise to the level of activities characteristic of organized crime. The result of such a conclusion would be that the plaintiff would receive the damages to which he would otherwise be entitled under state common law, the federal securities laws,

or other bases for a cause of action. The plaintiff, in such a case, would only lose the windfall of treble damages, which Congress never intended to provide to him or her anyway. Finally, the approach we suggest would enable the Seventh Circuit in this case to follow its understanding that Congress probably never really intended RICO to apply to "improperly calculated interest charges by a commercial bank" without at the same time so construing the statute as to rule out legitimate cases which Congress *did* intend to cover.

B. *The "Person/Enterprise" Problem*

In the preceding section of this brief we discussed the need, under the statute, for a "pattern of racketeering activity" to have caused an injury in order for a plaintiff to be entitled to RICO damages. But the "pattern of racketeering activity" is only one of the elements a plaintiff must prove. The law requires something more. That something more is that the defendant—characterized in the statute as a "person" —must cause injury to the plaintiff's business or property by reason of the defendant's violation of Section 1962. Section 1962, in turn, declares it unlawful for such "person" to conduct or participate in the conduct of an "enterprise's" affairs through the pattern of racketeering activity.

It is this relationship between the statutory "person" and "enterprise" that provides an additional basis for defining a special racketeering activity requirement which recognizes the clear statutory language, yet still implements the underlying statutory purpose. One of the few points upon which the many courts which have construed civil RICO have virtually all agreed is that RICO requires that there be two

entities or individuals which interact to bring about the plaintiff's injury, and that the injury must be traceable to the "person's" conduct of a separate "enterprise" through a pattern of racketeering activity. For this reason, cases have almost universally been dismissed where only one entity was involved. In such cases, almost all courts have held that there must be two actors, and that a single entity cannot be both the statutory "person" (amenable to a civil suit for damages) and the statutory "enterprise" (which cannot be sued for damages).[8]

The necessity for separate entities to constitute the "person" and "enterprise" is apparent not only from the statutory language itself, but also stems from the legislative purpose which underlies the enactment of RICO. As this Court and many others have noted, "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *United States* v. *Turkette,* 452 U.S. 576, 591 (1980).

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[8] *B. F. Hirsch* v. *Enright Refining Co., Inc.,* No. 84-8087 (3d Cir. Dec. 31, 1984); *Rae* v. *Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984); *Bennett* v. *Berg,* 685 F.2d 1053, 1061 (8th Cir. 1982); *United States* v. *Computer Science Corp.,* 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983); *Willamette Savings & Loan* v. *Blake & Neal Finance Co.,* 577 F. Supp. 1415, 1427 (D. Or. 1984); *Wilcox Development Co.* v. *First Interstate Bank of Oregon, N.A.,* 590 F. Supp. 445 (D. Or. 1984); *Kaufman* v. *The Chase Manhattan Bank N.A.,* 581 F. Supp. 350 (S.D.N.Y. 1984); *Nelson* v. *National Republic Bank,* [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,481 (N.D. Ill. 1984); *Kirschner* v. *Cable/Tel Corp.,* 576 F. Supp. 234 (E.D. Pa. 1983); *D&G Enterprises* v. *Continental Illinois National Bank,* 574 F. Supp. 263, 270 (N.D. Ill. 1983); *Yancoski* v. *E. F. Hutton & Company, Inc.,* 581 F. Supp. 88 (E.D. Pa. 1983).

Thus, the statutory "person" is the analogue of organized crime, while the statutory "enterprise" is the infiltrated business, victimized by its takeover or domination by the "person" whose activities Congress was aiming to deter and punish. Whether the "persons" sued are truly members of "organized crime" is, as we pointed out above, irrelevant, since Congress chose to permit suits against those "persons" who had engaged in the enumerated predicate acts, provided they also conducted the affairs of a separate "enterprise" through a pattern of racketeering activity.

Reading the key statutory provisions together and considering the purposes underlying RICO, we respectfully submit that a civil RICO treble damage plaintiff should be required to prove (1) the commission by a defendant "person" of the required "pattern of racketeering activity," (2) substantial domination or control of that "person" (3) over the conduct of the affairs of a separate "enterprise" through such pattern of racketeering activity, and (4) damage resulting to the plaintiff from the "person's" conduct of the "enterprise's" affairs through such a pattern.

Application of the statutorily-rooted four-part test set forth above will screen out those cases which do not present the concerns Congress sought to address in RICO, while still preserving a right to damages for appropriate victims of a "pattern of racketeering activity." In this case, for example, there is no allegation that any individual or entity (the RICO "person") caused a separate and independent entity (the RICO "enterprise") by reason of the defendant's domination or control, to overcharge the borrowers by conducting the enterprise's affairs through multiple

acts of mail fraud. The mail fraud allegations are instead directed solely at the bank itself, and the bank's actions are not alleged to have been affected in any way by any other entity.

While the Seventh Circuit recognized below that RICO required a separate "person" and "enterprise" for civil liability to be found, it erroneously held that the bank defendant could be said to have operated the affairs of its holding company parent because "we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation." *Haroco,* 747 F.2d at 402-403. Such reasoning completely ignores both RICO's language and purpose. The approach adopted by the Seventh Circuit fails to recognize that there is no allegation in this case that the bank, in the act of overcharging its borrowers, dominated or controlled its parent in such a way as to cause the parent to act in an illegal manner. Instead, the total relationship at issue in this case is that of bank to borrower; and that relationship does not implicate in any active manner the affairs of the bank holding company. Indeed, the addition of the bank holding company in this very case was an afterthought in an Amended Complaint which was filed only after a Motion to Dismiss attacked the original Complaint's characterization of the bank as both the "person" and "enterprise." The bank holding company was neither sued nor mentioned in the original Complaint.

The Seventh Circuit's approach, moreover, makes RICO civil liability ultimately turn on the neutral, passive fact of whether the defendant "person" happens to be an independent or affiliated corporation, rather than requiring active conduct by the defendant

which causes illegal activity by a separate entity by virtue of the defendant's domination or control over that entity. In doing so, the court acted inconsistently with the decision of this Court in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731 (1984), in which the Court held that a parent corporation and a wholly owned subsidiary are incapable of conspiring with one another for purposes of the antitrust laws. The Seventh Circuit in this case expressly declined to follow *Copperweld* because of allegedly different premises behind RICO and the antitrust laws. We maintain that this is not an adequate distinction. What this Court said about parents and subsidiaries is equally true and applicable without regard for the particular context:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. *Id.* at 2742.

If liability is to be predicated upon the interrelationship of the bank and bank holding company, a RICO plaintiff must be able to allege some meaningful domination or control by one of those entities (the "person") over the affairs of the other (the "enterprise") in such a way as to cause the other to commit illegal activity as a matter of corporate policy dictated by the defendant. A mere relationship or association, without more, is a neutral fact under RICO, which requires the active "conduct" by the "person" of the affairs of the "enterprise."[7] As the Eighth Circuit

[7] It is for this reason that the suggestion that individual employees, such as loan officers, could be viewed as the RICO "persons" is also unsound, unless such individuals exercised such domination or control over the enterprise bank as to affect its corporate policies. Otherwise, an illegal act of mail fraud by a loan officer might result in the "enterprise" bank itself being held liable even where it was not involved in the individual's wrongdoing, a result wholly inconsistent with the clear statutory language, as well as the policies underlying RICO.

en banc properly held in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 (1983) on this very point:

> [T]he en banc court is concerned that the complaint may be deficient as failing to allege adequately the requisite degree of participation in or conduct of the affairs of an enterprise on the part of each named defendant. Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

The appropriate parameters of a special racketeering activity requirement can further be illustrated by a comparison of the results which would be obtained under the four-part test suggested in this section with those obtained by the Second Circuit in its recent decisions in *Sedima* and *Bankers Trust*.

While the Second Circuit dismissed both cases, we respectfully submit that the dismissal in *Sedima* was correct (though for different reasons), but that the result in *Bankers Trust* cannot be harmonized with RICO's statutory purpose. *Sedima* involved a claim that the plaintiff was defrauded by its joint venturer

on a sale of goods to a foreign company through fraudulent purchase orders and other false documents which overstated costs. Since the joint venturer defendant's own fraudulent acts provided the basis for the RICO claims and the alleged fraud did not involve the domination or control by any discrete "persons" over the affairs of the joint venturer "enterprise" defendant, the RICO claims were properly dismissed, since these claims did not implicate any of the concerns which caused Congress to enact RICO.

In *Bankers Trust,* by contrast, allegations of a series of fraudulent acts by a group of controlling individuals and entities to strip a dominated enterprise of valuable assets, rendering it unable to repay the plaintiff bank on a loan, are sufficient, in our view, to satisfy the special racketeering activity requirement advocated in this Brief. *Bankers Trust* clearly identified a group of discrete controlling "persons" who dominated the borrower "enterprise" (Braten Apparel Corporation) and caused its affairs to be operated to the detriment of the plaintiff bank by stripping Braten of assets through a series of fraudulent acts, characteristic of organized crime, which qualified under Section 1961(5) as a "pattern of racketeering activity." In our view, this is all that RICO requires.

CONCLUSION

For the reasons stated herein, we respectfully urge the Court to adopt a construction of the Racketeer Influenced and Corrupt Organizations Act which would allow recovery of treble damages, costs and attorneys fees in those cases where a defendant has acted in a fashion characteristic of organized crime and has infiltrated and controlled or dominated a separate enterprise, all other elements of the claim being satisfied. This focus on the special nature of the activity involved rather than the special nature of the injury is a reasonable solution to an otherwise intractable definitional problem. Properly applied, the approach suggested will require neither that the statute be used to cover cases never intended by Congress nor that victims of true racketeering activity be deprived of the remedies Congress clearly intended for them. Moreover, the suggested approach fits well within the plain meaning of the statute and the legislative intent.

If the approach we suggest is adopted, the case now before the Court should be returned to the federal district court for further proceedings, in which the plaintiffs will be required to plead and prove, if they can, that the *activities* of the defendant bank were so far beyond the pale of normal business activity as to be characteristic of organized crime, and that the defendant bank controlled or dominated a separate

enterprise in a manner reminiscent of an infiltration of the enterprise by organized crime.

Respectfully submitted,

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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

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QUESTION PRESENTED FOR REVIEW

Whether a civil claimant seeking treble damages under the Racketeer Influenced And Corrupt Organizations Act ("RICO") must suffer damages merely by reason of the defendant's commission of statutorily prescribed offenses, without more, or rather by reason of the defendant's acquiring, maintaining control or an interest in, or conducting the affairs of an "enterprise" through the commission of such offenses.

PARTIES TO THE ACTION

Petitioners are American National Bank and Trust Company of Chicago, Walter E. Heller International Corporation, now known as Amerifin Corporation, and Ronald J. Grayheck. Petitioners' corporate parents, subsidiaries and affiliates are contained in the Appendix To Petition For Writ Of Certiorari (App. A-70).[1]

Respondents are Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co.

1. "App." refers to the Appendix contained in Petitioners' Petition For Writ Of Certiorari.

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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 747 F.2d 384 (7th Cir. 1984) and is reprinted in full in the Appendix to the Petition (App. A-1 to A-42). The opinion of the District Court is reported at 577 F. Supp. 111 (N.D. Ill. 1983).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 19, 1984. The Petition For Writ Of Certiorari was filed on November 21, 1984, and was granted on January 14, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

All of the provisions of the Racketeer Influenced And Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§1961-1968 are contained in the Appendix to the Petition (App. A-43 to A-56). Sections 1962 and 1964(c) are particularly germane.

Section 1962 provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C. §1962.

Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. §1964(c).

STATEMENT OF THE CASE

A. Summary Of The Claim[2]

American National Bank and Trust Company of Chicago ("ANB") is a national bank located in Chicago, Illinois, engaged in and whose activities affect interstate commerce. (App. A-58, ¶¶3, 4). It is in the general banking business, including the lending of money at contract interest rates. (App. A-58, ¶3). ANB is a wholly owned subsidiary of Walter E. Heller International Corporation ("Heller"), a publicly held company principally engaged in commercial banking, collateralized lending, mortgage banking, and a myriad of other financial services. (App. A-58, ¶5). Ronald J. Grayheck ("Grayheck") is one of ANB's officers and directors. (App. A-59, ¶6).

Respondents are related corporations which borrowed substantial sums from ANB. (App. A-59 to A-60, ¶¶10-14). In connection with those loans Respondents executed promissory notes, reciting that they agreed to pay ANB interest at a rate stated as an increment over ANB's prime rate. (App. A-59 to A-60, ¶¶10, 12, 14). The promissory notes signed by the Respondents defined "prime rate" as:

> The rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans.

(App. A-60, ¶14).

Respondents allege that ANB, acting through Grayheck and other ANB officers and employees, charged Respondents, and Respondents paid, interest rates in excess of what ANB

2. This summary is based on the Respondents' Amended Complaint, (App. A-57 to A-69) the factual allegations of which must be accepted as true because this case reaches this Court on review of an order granting Petitioners' Motion To Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. *See Miree* v. *DeKalb County, Ga.*, 433 U.S. 25, 27 n.2 (1977); *Jenkins* v. *McKeithen* 395 U.S. 411, 421 (1969). This Court need not, however, accept mere unsupported conclusions of fact or law.

represented in the promissory notes that it would charge. (App. A-60 to A-61, A-65, ¶¶16, 27). In other words, Respondents allege that ANB employed a method to calculate prime rate in a manner different than that contained in the promissory notes. (App. A-60 to A-61, ¶16).

B. The Proceedings Below

1. The District Court

In March of 1983, Respondents filed a complaint in the District Court for the Northern District of Illinois, seeking damages individually and as purported class representatives[3] of all others who borrowed from ANB pursuant to similar loan agreements with interest rates tied to ANB's prime rate. (App. A-62 to A-64, ¶¶21-23). The original complaint contained four counts and named ANB as the sole defendant. The only federal claim charged that ANB had violated RICO. ANB filed a Motion To Dismiss, contending, *inter alia*, that ANB could not be both the "enterprise" and "person" under Section 1962(c) of RICO.

In an attempt to cure the defects identified in Petitioners' Motion To Dismiss, Respondents filed an Amended Complaint. The Amended Complaint added Heller and Grayheck as defendants and expanded the original four-count complaint to five counts, including two alternative RICO counts, one against ANB and one against Heller and Grayheck. Specifically, in Count I Respondents charge ANB with violating RICO through multiple acts of mail fraud allegedly used to conduct either: (1) ANB's affairs; or (2) Heller's affairs. Count II alternatively charges Heller and Grayheck with violating RICO through multiple acts of mail fraud used to conduct ANB's affairs. The "mail fraud" in both counts refers to

3. Although the Respondents assert that their claims are appropriate for class certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, they did not seek certification of the purported class prior to the dismissal of their Amended Complaint.

ANB's use of the United States Postal Service for: (1) delivery of notices to its borrowers of changes in interest rates; and (2) receipt of borrowers' interest payments. (App. A-61, ¶16).[4]

Petitioners filed another Motion To Dismiss on the grounds that the Amended Complaint failed to state a claim upon which relief could be granted because: (1) the RICO counts failed to allege the required causal nexus between the alleged injury and a violation of Section 1962; (2) the RICO counts failed to appropriately allege the necessary "person/enterprise" relationship; (3) the RICO count against Heller and Grayheck failed to allege with sufficient particularity the claims of mail fraud in violation of Rule 9(b) of the Federal Rules of Civil Procedure; and (4) the pendent state law counts for breach of fiduciary duty and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act failed to state legally sufficient claims under Illinois law.

On July 28, 1983, the District Court granted the Petitioners' Motion to Dismiss, holding that the Respondents' RICO claims in the Amended Complaint were fatally defective because "the only injuries the plaintiffs allege were direct consequences of instances of mail fraud and were not produced 'by reason of a violation of section 1962.' " 577 F. Supp. at 114-115. As a result, it did not find it necessary to address the remaining asserted deficiencies in the RICO claims. The District Court also dismissed the state claims since jurisdiction over those claims was based exclusively on their pendency to the RICO claims. *Id.*

4. The remaining three counts assert state law claims, allegedly pendent to the federal RICO claims. Count III alleges a breach of contract because the agreed upon interest rates were not used. (App. A-65 to A-66, ¶¶28-32). Count IV alleges that ANB's method of calculating interest on its loans violated the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, §262. (App. A-66 to A-67, ¶¶33-36). Count V alleges that ANB breached an asserted fiduciary duty owed to Respondents. (App. A-67 to A-69, ¶¶37-42).

2. The Court of Appeals

On October 19, 1984, the Court of Appeals for the Seventh Circuit reversed the District Court's decision on the issue of the type of injury which a civil RICO claimant must allege.[5] The Court of Appeals held that "a civil RICO plaintiff need not allege or prove an injury beyond any injury to business or property resulting from the underlying acts of racketeering," concluding that Respondents' allegations of injury from the allegedly excessive interest charges satisfy Section 1964(c). 747 F.2d at 398. (App. A-28).

In reaching its conclusion, the Seventh Circuit recognized that the injury required under Section 1964(c) has been one of the "most hotly disputed RICO issues" dividing the district courts. 747 F.2d at 387. (App. A-6 to A-7). Indeed, during the pendency of the appeal in this case, the Court of Appeals for the Second Circuit issued three decisions contrary to the position taken by the Seventh Circuit in this case. *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (Jan. 14, 1985) (No. 84-648); *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir. 1984), *petition for cert. filed, sub nom. Joel* v. *Cirrito*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604) (commonly referred to as the "*Sedima* trilogy"). Further, shortly after the *Sedima* trilogy was decided and while the appeal in this case was still pending before the Seventh Circuit, the Eighth Circuit issued

5. The Court of Appeals affirmed the District Court's judgment with respect to the portion of Count I alleging that ANB conducted its own affairs through a pattern of racketeering activity. (App. A-42). Hence, the Seventh Circuit joined the Fourth and Ninth Circuits in holding that the same entity cannot be both the liable "person" and the "enterprise" under Section 1962(c). *See Rae* v. *Union Bank*, 725 F.2d 478 (9th Cir. 1984); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *Contra*, *United States* v. *Hartley*, 678 F.2d 961 (11th Cir. 1982). Count I was sustained, however, on the alternative claim alleged that ANB conducted Heller's affairs through a pattern of racketeering activity.

an opinion addressing the requisite injury in civil RICO claims. *Alexander Grant & Co.* v. *Tiffany Industries*, 742 F.2d 408 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3541 (U.S. Jan. 2, 1985) (No. 84-1084).

In the final analysis, the Seventh Circuit concluded that, to require a RICO injury to be anything other than that injury which resulted from the underlying acts, would be an unjustified exercise in "aggressive jurisprudence." (App. A-30). That holding, however, effectively eliminated RICO's requirement that a civil claimant must have suffered an injury "by reason of a violation of section 1962." In its place the Seventh Circuit has substituted the insular requirement that a civil RICO claimant need only be injured by reason of one facet of the violation of Section 1962—i.e., the commission of two underlying predicate acts enumerated in Section 1961.

SUMMARY OF ARGUMENT

It is axiomatic that it is not the role of the judiciary to either expand or narrow the scope of any statute including civil RICO. Rather, that prerogative is a matter within the sole province of Congress.[6] Courts must refrain from venturing into the realm of policymaking by rewriting or editing statutes Congress has enacted, even if designed to improve upon them. The task of the judiciary is simply to construe what Congress' words mean.

That is not to say that statutory construction must occur in a vacuum without regard to the consequences of that construction. The difficulties in construing a statute, as Justice Frankfurter observed, "are inherent not only in the nature of words, of composition, and of legislation generally [but] are often intensified by the subject matter of an enactment."[7] Without question, RICO's subject matters—organized crime, the mafia, treble damages, criminal and civil forfeitures—have intensified lower courts' difficulties in its construction. Indeed, that task has evoked such an intense and diverse body of opinions with respect to its scope that the single common ingredient in the lower court opinions is the consistent reluctance to follow the plain meaning of the words. Instead, the decisions legislate by expanding or contracting the statutory scheme created by Congress.

The issue before this Court illustrates that dichotomy which pervades RICO decisions. On the one hand, the Seventh Circuit has effectively extended civil RICO to circumstances which are clearly beyond the plain meaning of the words of the statute and the intent of Congress. On the other

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6. Senator Strom Thurmond, chairman of the Senate Judiciary Committee, has announced his intention to conduct hearings this year on the "proliferation" of civil RICO suits. *See* Fed. Sec. L. Rep. (CCH) No. 1109 (January 23, 1985).

7. Frankfurter, *Some Reflections On The Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947).

hand, in the *Sedima* trilogy, the Second Circuit has concluded the statute is ambiguous and rewritten civil RICO more restrictively than either the language or legislative history of the statute dictates.

In contrast to both, there is a middle ground which Petitioners espouse that neither expands nor narrows the scheme of RICO. That middle ground is totally consistent with both the language and the purpose of the statute, and does not lead to absurd judicial results. It is achieved by adhering to the fundamental guidepost of statutory construction — construing the plain meaning of the words. Within the context of this case, that meaning is readily discernible.

A claim for damages under RICO has two distinct elements. First, it must allege a violation of the substantive RICO statute, Section 1962, commonly referred to as "criminal RICO." Second, the civil plaintiff must allege the requisite injury under Section 1964(c), commonly called "RICO injury." The "RICO injury" requirement is satisfied only if the plaintiff was "injured in his business or property by reason of a violation of 1962." Thus, by definition, the second element can only be present if the plaintiff has adequately established a violation of Section 1962 since a "RICO injury" must flow from "a violation of section 1962".

Section 1962, or criminal RICO, has two separate and distinct facets: (1) a pattern of racketeering activity; (2) the use of that pattern to acquire, maintain or conduct an enterprise. Specifically, Respondents charge the Petitioners violated Section 1962(c) which prohibits the conduct of an enterprise's affairs through a pattern of racketeering activity. The mere commission of a pattern of racketeering activity, without the requisite use of that activity in relation to an enterprise, and no more, does not violate Section 1962(c).

The Seventh Circuit, however, disregarded whether Respondents, in fact, alleged conduct which constitutes a violation of Section 1962(c), and thus totally ignored the statutory mandate that the alleged injury result from "a violation

of section 1962." If the Seventh Circuit had heeded the meaning of Section 1962(c) and the conduct it prohibits, it would have concluded that the alleged wrongdoing here does not constitute a violation of Section 1962(c) which requires more than a simple breach of contract and mail fraud as Respondents allege in this case.

In contrast to the Seventh Circuit's approach, Petitioners' construction of the plain meaning of Section 1962(c) by using the statutory definitions and the usual and ordinary meaning of the undefined terms, produces a logical coherent result. A violation of Section 1962(c) occurs only when the offender commits the underlying racketeering offenses in connection with his managing or directing the course of the enterprise's affairs. Absent this critical nexus between the commission of the underlying predicate offenses and the management of the business, there is no violation of Section 1962(c).

The requirement of Section 1962(c) that the pattern of racketeering activity be integrally linked with the management and operation of the enterprise's affairs totally fulfills Congress' objectives in enacting RICO. The legislative history emphasizes, and this Court has previously recognized, that the primary purpose of RICO is to eradicate organized crime, by eliminating its economic power, especially through those criminal elements which have infiltrated legitimate businesses. Admittedly, Congress drafted the statute with sufficient breadth to encompass commercial fraud and include within its reach persons other than those belonging to criminal syndicates. Section 1962(c) is not, however, boundless. It was designed to address only circumstances in which the alleged racketeering activity is the means by which a person is conducting and directing the affairs of an enterprise, not to federalize conduct for which civil and criminal remedies were already available.

ARGUMENT

A. Section 1964(c) Requires An Injury "By Reason Of A Violation Of Section 1962"

The Seventh Circuit correctly began its "treasure hunt"[8] in search of the RICO injury with the language of the statute. Section 1964(c) expressly provides a private cause of action to:

> Any person injured in his business or property *by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. §1964(c) (emphasis added). The Seventh Circuit aptly observed that, contrary to the position taken by the Second Circuit in *Sedima*, this language is not ambiguous and concluded that:

> As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of Section 1962 must, directly or indirectly, have injured the plaintiff's business or property.

747 F.2d at 398 (App. A-28). Petitioners do not quarrel with this proximate cause analysis. The analysis fell short, however, because it misapprehended what constitutes "criminal conduct in violation of Section 1962." Petitioners submit that the injury must be causally related to the violation of Section 1962. The Seventh Circuit, however, held an injury related solely to the violation of the underlying predicate offenses is sufficient.

The "judicial gloss" added by the Seventh Circuit to the requisite causal nexus cannot be reconciled with the plain

8. 747 F.2d at 384 (App. A-4), *quoting Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984).

meaning of Section 1962 which unmistakably requires something more than the commission of the underlying predicate acts. The Seventh Circuit's definition of a "RICO injury" as an injury resulting "from the underlying acts of racketeering" (App. A-28) rewrites Section 1964 to require an injury "by reason of a violation of *section 1961*," not Section 1962. Although it reached an opposite conclusion, the Second Circuit's construction of Section 1964 in *Sedima* comes no closer to its plain meaning than that of the Seventh Circuit. The Second Circuit concludes that "the 'by reason of' language in section 1964(c) is intended to limit standing to those injured by a 'racketeering injury,' by an injury of the type RICO was designed to prevent." 741 F.2d at 495.

Looking only to the predicate acts in Section 1961 or to the "types of injury which the statute was designed to prevent," will not resolve the issue of whether a plaintiff has sustained a RICO injury. Rather, that question can only be answered by resolving the initial and paramount question of whether a violation of Section 1962 is alleged. When that task is accomplished, the determination of whether the alleged injury flowed from the violation is much less complex. Thus, attempts by the lower courts to define a RICO injury without first defining a "violation of section 1962" only beg the question. The resolution must lie in the meaning of "a violation of section 1962."

B. The Plain Meaning Of "A Violation Of Section 1962"

Construing Section 1962 is no more laborious or challenging than the process of construing any other statute. Subsections (a), (b) and (c) each require a "pattern of racketeering activity," further defined in the statute as mandating at least two acts of "racketeering activity." 18 U.S.C. §1961(5). "Racketeering activity", often referred to as the predicate acts, is defined to include any of a multitude of offenses enumerated in Section 1961(1). Mail fraud is among those offenses and the offense which Respondents claim Petitioners committed at least twice, and which constitutes a "pattern of racketeering activity." This, without more, is all

that the Seventh Circuit concluded is necessary to violate Section 1962 at least as that phrase is used in Section 1964.

The pattern of racketeering activity is, however, not all that Section 1962 proscribes. Each subsection makes unlawful a particular use of the pattern of racketeering in connection with an enterprise.[9] In other words, criminal RICO is violated only when the pattern of racketeering activity is used in one of the ways prohibited by Section 1962(a), (b), or (c). Section 1962 is simply incapable of any other interpretation if each word and clause is to be given effect. *See, e.g., Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (in expounding a statute, the court must not be guided by a single word or sentence, but by the entire provisions of the law).

Confining a criminal RICO violation to nothing more than the commission of the pattern of racketeering activity cannot be reconciled with the congressional objectives which unquestionably focused on organized crime's infiltration of legitimate business and on divesting organized crime of the

9. "Enterprise" is yet another statutory concept, defined as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4).

fruits of its ill-gotten gains.[10] Indeed, it would have made little sense to redundantly make unlawful the commission of two offenses, each of which was already unlawful under state or federal law.[11]

Economic penetration or infiltration of business achieved by criminal activities, then, is the crux of criminal RICO and it is that infiltration element which the subsections

10. Congress' focus on the economic impact of organized crime was explicit in its statement of findings:

> The Congress finds that (1) *organized crime* in the United States is a highly sophisticated, diversified, and widespread activity that *annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption*; (2) *organized crime derives a major portion of its power through money obtained from such illegal endeavors* as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitations; (3) *this money and power are increasingly used to infiltrate and corrupt legitimate business* and labor unions and to subvert and corrupt our democratic processes; (4) *organized crime activities* in the United States *weaken the stability of the Nation's economic system*, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Pub. L. No. 91-452, 84 Stat. 947 (1970) (emphasis added).

11. The Department of Justice Guidelines for RICO recognizes that RICO violations consist of more than just the underlying offenses, and cautions government attorneys that "a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances case, will not be added to an indictment unless it serves some special RICO purpose . . . " CCH Trade Reg. Rep. ¶50,452 (Sept. 6, 1983).

of Section 1962 are designed to prevent. Each subsection approaches the problem which Congress addressed from a specific and discrete perspective.

Section 1962(a) is aimed at infiltration by prohibiting the use of income derived from the racketeering activity or its proceeds. Specifically, it prohibits using or investing that income in: (1) the acquisition of an interest in an enterprise; (2) the establishment of an enterprise; or (3) the operation of an enterprise.

Section 1962(b) is aimed at infiltration by forbidding the use of the racketeering activity, itself, as opposed to any income received therefrom, to: (1) acquire any interest in or control of an enterprise; or (2) maintain any interest in or control of an enterprise.

Section 1962(c), the relevant section in this case, is likewise aimed at the unlawful use of a pattern of racketeering activity in connection with the conduct of an enterprise's affairs, providing as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The conduct proscribed by Section 1962(c), unlike that in Sections 1962(a) and (b), requires that the enterprise's actual affairs to be conducted through the use of the underlying criminal offenses. In contrast, the conduct proscribed by Sections 1962(a) and (b), does not require that the affairs of the enterprise have any connection with the underlying criminal

offenses so long as they serve as a vehicle to acquire an ownership interest or establish control in the enterprise.[12]

An integral relationship between the pattern of racketeering activity and the conduct of the enterprise's affairs, therefore, is essential to plead and prove a violation of Section 1962(c). The terms defining the prohibited relationship, "conduct" and "through," do not have statutory definitions. Accordingly, their usual and ordinary dictionary meanings must be used. *See, e.g., United States* v. *Rodgers*, ____ U.S. ____, 104 S.Ct. 1942, 1946 (1984); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982); *California Brewers Ass'n.* v. *Bryant*, 444 U.S. 598, 606 1980). "Conduct" means "to lead", "to direct the course of, manage, control" or "to have the direction of." Webster's Third New International Dictionary 474 (1971); American Heritage Dictionary 279 (1969). "Through" is defined as "by means of", or "from beginning to end; completely, thoroughly". Webster's Third New International Dictionary 2384 (1971); American Heritage Dictionary 1341 (1969). Using these definitions, Section 1962(c) prohibits a person associated with an enterprise to direct the course of or manage the affairs of the enterprise by means of the pattern of racketeering activity. More simply framed, a violation of Section 1962 occurs only when the racketeering activity is being used as an integral part of the enterprise's affairs.

In this case, there is no allegation and, indeed, there could not be, that Heller or Grayheck were directing or managing ANB's business through the overcharges of interest rates tied to prime rates. Similarly, Respondents do not and

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12. In fact, one of the Department of Justice's criticisms of the original bill, S. 1623, was that it was too narrow because it "merely prohibits the investment of prohibited funds in business, but fails to prohibit the control or operation of such a business by means of prohibited racketeering activities." *Hearings Before The Subcomm. On Criminal Laws & Procedures Of The Senate Comm. On The Judiciary*, 91st Cong. 1st Sess. 387 (1969). The plain meaning of subsection (c), added in a subsequent bill, specifically treats this criticism.

cannot allege that ANB manages Heller's affairs by virtue of its calculation of its prime rate. Rather, the alleged acts of racketeering are merely incidental to ANB's banking business. They are likewise even more incidental to Heller's ownership as a financial services company of its subsidiary ANB. Finally, the alleged acts of racketeering are not even alleged to be part of a scheme whereby Grayheck or Heller in the case of ANB, or ANB in the case of Heller, is controlling or managing the business.

If, indeed, Congress had meant to prohibit the mere occurrence of a pattern of racketeering activity within an enterprise, it could have done so. Instead, in keeping with its objective to eradicate the infiltration of legitimate business by organized crime, it prohibited the "conduct" of an enterprise's "affairs" "through" a pattern of racketeering activity. If a violation of Section 1962(c) does not require the pattern to be an inseparable part of the management of the business, "conduct," "affairs" and "through" are superfluous and the congressionally mandated parallel nature of the subsections of Section 1962 — each of which prohibits a particular use of the pattern of racketeering activity — is destroyed.

C. Congress' Intent Was Not Contrary To The Plain Meaning of Section 1962(c)

In the absence of "a clearly expressed" contrary legislative intent, unambiguous statutory language is conclusive. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See Russello* v. *United States*, ___ U.S. ___, 104 S.Ct. 296 (1983); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). *Accord* Frankfurter, *Some Reflections On The Reading Of Statutes*, 47 Colum. L. Rev. 527, 538 (1947), *quoting* Justice Holmes ("When Counsel talked of the intention of a legislature, I was discreet enough to say I don't care what their intention was. I only want to know what the words mean."). *See also Commissioner* v. *Gordon*, 391 U.S. 83, 93 (1968) ("a court is not free to disregard requirements simply because it considers them redundant or unsuited to achieving the general purpose in a

particular case."). Whether language is "ambiguous" can, of course, also be the subject of controversy. But regardless of whether Section 1962(c)'s language is ambiguous or unambiguous, the conclusion as to its meaning remains unchanged since it is totally consistent with the legislative history.

The purpose Congress sought to achieve when it enacted RICO has already been considered by this Court. *Russello* v. *United States*, ___ U.S. ___, 104 S.Ct. 296, 303 (1983); *United States* v. *Turkette*, 452 U.S. 576, 591 (1981). There is also a wealth of legal literature on the subject.[13] While differences of opinion may exist with respect to the precise scope of the statute, there is no disagreement that the primary purpose of RICO was to eliminate and prevent the "infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong. 1st Sess. 76 (1969). *Accord United States* v. *Turkette*, 452 U.S. 576, 591 (1981); *Russello* v. *United States*, ___ U.S. ___, 104 S.Ct. 296, 303 (1983). Similarly, although one can select isolated excerpts from the Congressional Record and the Senate and House Hearings and Reports to support a contrary position, an objective review of the legislative history demonstrates that Congress understood that RICO's reach extended beyond traditional criminal acts into the commercial arena. *See, e.g.*, 116 Cong. Rec. 35,205 (1970) (remarks of Congressman Mikva).

The legislative history is, however, almost barren with respect to the civil private cause of action Congress created. Moreover, it is totally void in regard to the requisite injury a civil claimant must have suffered as a prerequisite to invoking the treble damage provision. Virtually all of the debates and discussion relating to the civil

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13. *See, e.g., Blakey, The RICO Civil Fraud Action In Context: Reflections on Bennett* v. *Berg, 58 N.D. Law. 237 (1982)*; Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837 (1980); McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties? 46 N.D. Law. 55 (1970)*; Note, *RICO And Securities Fraud: A Workable Limitation*, 83 Colum. L. Rev 1513 (1983).

injunctive and forfeiture remedies and civil investigative demands available to the Attorney General. 18 U.S.C. §§1963, 1968.[14] The paucity of comment is a function of the fact that the original bill was introduced and passed by the Senate with no provision for a private right of action. *Hearings Before The Subcomm. on Criminal Laws & Procedures of the Senate Comm. on the Judiciary*, 91st Cong. 1st Sess. 4-104 (1969). Only after the American Bar Association urged it to do so did the House Judiciary Committee add the private right of action. That did not occur until August of 1970. S.30, 91st Cong. 2d Sess., 116 Cong. Rec. 35,295-96 (1970). But even with the ABA amendment to include what is now Section 1964(c), there was no specific debate or discussion articulating the scope of the private civil action. In fact, the speed with which Congress moved to enact the bill following the final amendment, apparently due to the 1970 election, was criticized. *See* 116 Cong. Rec. 35,210 (remarks of Congressman Conyers).

Notwithstanding the barren legislative slate on which this Court must write, the few comments directed to Section 1962(c) are totally compatible with the construction that adheres to the plain meaning of the words as Petitioners urge. For example, the provisions of the final version of the bill were characterized on the House floor as follows:

> The title prohibits the investment of funds derived from a pattern of racketeering activity or from the collection of an unlawful debt, where the investor participated as a principal, in a business engaged in interstate commerce. It also proscribes the acquisition, maintenance or control of any interest in a business engaged in commerce through a pattern of racketeering activity or the collection of

14. *See, e.g.*, 115 Cong. Rec. 6,993 (1969) (remarks of Senator Hruska who introduced S.1623, the predecessor to the bill which ultimately became RICO) ("[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill . . .").

> unlawful debts. *The conduct of the affairs of a business by a person acting in a managerial capacity, through racketeering activity is also proscribed.* Conspiracies to violate any of the provisions of the title also are made punishable.

116 Cong. Rec. 35,196 (Congressman Celler) (emphasis added).

The only other comments specifically addressed to the private treble damage remedy were those of Congressman Steiger who reported on his proposal to include certain procedural provisions for the civil cause of action:

> Authorization in title IX of the entire range of civil as well as criminal remedies, private as well as public, is very important to the effectiveness of the title. The value of private treble damage and equitable suits has been amply demonstrated in the antitrust field, where they have been extremely effective in preventing and rectifying economic harm to individuals and companies, and in furthering the public purpose of preventing improper commercial practices. *That entire gamut of civil remedies is still more important to title IX where corrupt and violent means are used to take over legitimate businesses*, than in the antitrust laws, where the unlawful means used are less reprehensive and seldom violent. There can be no reason not to provide the individuals harmed by title IX violations, as well as the general public, with the additional protection those further remedies would provide.

116 Cong. Rec. 35,227 (emphasis added).

Thus, what little legislative history that exists supports the construction asserted by Petitioners. The absence of a more definitive legislative history, moreover, does not relieve this Court of its judicial duty to accurately interpret the language of Congress in light of the evident legislative purpose. *See, e.g., United States* v. *Bornstein*, 423 U.S. 303 (1976);

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975).

As noted, the one consistent theme that emerges from its legislative history confirms that RICO's private cause of action was aimed at eliminating the use of criminal conduct to infiltrate, take over, or manage business concerns — a purpose fully vindicated by the plain meaning of Section 1962(c). Congress expressly provided that RICO was not intended to usurp other available remedies for the commission of the underlying offenses. Those offenses represent only a part of a RICO violation. As Congress stated:

> [N]othing in this title shall supersede any provision of Federal or State law imposing criminal penalties or affording civil remedies in addition to those provided for in this title . . .

Pub. L. No. 91-452, 84 Stat. 947 (1970).

To construe the statute as criminalizing acts which are only incidental to an enterprise's affairs, and which are already unlawful under other federal and state statutes, dilutes the effect of what Congress was trying to achieve by enacting RICO.

D. RICO's Liberal Construction Clause Is Not Applicable To Section 1962

Mindful of the novelty of some of RICO's remedial provisions, notably those permitting civil forfeiture, Congress suggested a reading of the statute so that the "provisions of this title shall be liberally construed to effectuate its remedial purposes." 84 Stat. 947. This interpretative guideline does not, however, permit a court to sweep aside the plain meaning of the statute. Rather, such statutory rules of construction serve only to resolve ambiguities and have no relevance where the statutory language is clear. *See, e.g., Callanan* v. *United States*, 364 U.S. 587, 596 (1961); *United States* v. *Brown*, 333

U.S. 18, 25-26 (1948). *See also* 2A, 3 Sands, *Sutherland Statutory Construction*, §§58.05, 60.01 (4th ed. 1974) ("a legislative mandate to apply a liberal construction to an act will not justify the judicial creation of right or liabilities under the guise of 'construction.' "). Indeed, this Court in *Turkette* and *Russello* refused to consider the rule of "leniency" in construing provisions of RICO because the statute's language was clear. 452 U.S. at 587 n. 10; 104 S.Ct. at 297.

Even if Section 1962(c) were ambiguous, the liberal construction clause is not applicable to it. By its own terms, the clause dictates liberal construction only to "effectuate remedial purposes." It does not mandate that the substantive portion of RICO be liberally construed to determine what conduct constitutes a violation of Section 1962.[15] The "remedial purposes" of RICO consist of Sections 1964 and 1968, providing for civil injunctions, divestiture, private rights of action, and civil investigative demands, respectively.[16]

Section 1962, in contrast, is the controlling substantive provision of RICO, applicable to both the criminal and civil aspects. Thus, the limitation imposed by the Act on the liberal construction clause — "to effectuate its remedial purposes" — was obviously designed to avoid the serious constitutional questions posed if the liberal construction clause were applied to the criminal aspects of RICO.[17] This Court has repeatedly held that persons should not have to

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15. *See generally*, Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 178 (1980).

16. Moreover, this Court has repeatedly stressed that the invocation of the "remedial purpose" of a statute will not justify construing a provision "more broadly than its language and the statutory scheme reasonably permit." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576 (1979); *Securities & Exchange Commission* v. *Sloan*, 436 U.S. 103, 116 (1978).

17. S. Rep. No. 617, 91st Cong. 1st Sess. 81 (1969) ("Nevertheless, it must be emphasized that these [civil] remedies are not exclusive, and that Title IX seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil").

speculate as to what conduct is prohibited. *See, e.g., Dunn* v. *United States*, 442 U.S. 100, 112 (1979); *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *Grayned* v. *City*, 408 U.S. 104, 108 (1972).

While this case like most civil RICO cases is not also an actual criminal case, the same words in Section 1962 cannot mean one thing for private litigants and another for federal prosecutors. *See Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (held that Section 1304 of the Communications Act would not be construed broadly for purposes of civil sanctions by the FCC since such a construction would also apply in criminal cases). Any hesitancy in construing a violation of Section 1962(c) to require a person to use the pattern of racketeering activity in connection with his management of the enterprise's affairs, as opposed to an incidental use, gives way to the Court's own doctrine which dictates a construction in favor of leniency to potential offenders. To find without more that the mere occurrence of two acts constituting defined offenses by a person associated with an enterprise violates Section 1962(c) deprives potential offenders of due process since they would be subject to the vagaries of a liberal construction.

E. There Are No Policy Considerations Requiring A Less Than Literal Reading Of Section 1962(c)

Although public policy reasons may occasionally stimulate the expansion of the plain meaning of a statute, *see Mohasco Corp.* v. *Silver*, 447 U.S. 807, 815, 833 (1980), none require more than a literal construction here. The Seventh Circuit's reading of RICO's terms more broadly than the language of the statute mandates is especially unsound since RICO was not created as a nostrum for every offense which might cause injury. Indeed, a host of remedies are available to

persons injured by the underlying racketeering acts enumerated in RICO.[18]

In effect, the Seventh Circuit decision authorizes a federal claim for treble damages in any private business dispute which involves two interstate telephone calls or two pieces of mail. If Congress had intended to sweep so broadly, it would have said so. *See, e.g., Russello* v. *United States*, ____ U.S. ____, 104 S.Ct. 296, 302 (1983). Similarly, the Seventh Circuit's comment that the interpretation of Section 1962(c) as urged by the Petitioners is "aggressive jurisprudence" which could only be justified "[i]f the safety or stability of the Republic demanded" 747 F.2d at 399. (App. A-30) ignores the devastating impact civil RICO cases have had on the federal courts' dockets.[19]

Petitioners do not suggest that the current and predictable flood of future civil RICO cases, which will clog currently overburdened district and even appellate federal courts with "garden-variety" fraud actions, is a sufficient reason to reverse the decision below. Nevertheless, the fact that Congress did not intend to federalize all disputes in which two writings were delivered by the mailman offers an additional

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18. In fact, a telling distinction in the language of Section 1964 compared to the language of Section 4 of the Clayton Act underscores the limited purpose of RICO. Section 4 of the Clayton Act provides that:

> Any person who shall be injured in his business or property by reason of *anything forbidden* in the antitrust laws may sue therefor . . .

15 U.S.C. §15 (emphasis added). Section 1964, although patterned on Section 4 of the Clayton Act, does not provide a private right of action for "anything forbidden" in RICO which would arguably include the predicate offenses listed in Section 1961 alone. Rather, it restricts the private action to only those injured by reason of a violation of Section 1962, not the catalogue of offenses recited in Section 1961.

19. *See* Sec. Reg. & L. Rep. (BNA) No. 16, at 539 (April 13, 1984). Although there are no precise statistics quantifying the flood of litigation that RICO has already created in the federal courts which would otherwise have been filed in the state courts, it will surely increase if RICO is expanded to include all common law fraud actions and many breach of contract claims such as in this case.

reason to adhere to the plain meaning of Section 1962(c). Moreover, adopting the plain meaning of Section 1962(c) does not reduce "RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations" as the Seventh Circuit conjectured. 747 F.2d at 398. (App. A-27).[20]

Similarly, Petitioners do not adopt the position expressed in the *Sedima* trilogy. The Second Circuit's restriction of the statute to "an activity which RICO was designed to deter," further described in terms that require criminal convictions and links to "mobsters" or "organized crime," narrows as much as the Seventh Circuit expands. 741 F.2d at 495-496.

Rather, Petitioners submit that the approach which should be adopted in construing Sections 1964 and 1962(c) is to plumb their plain meaning. This approach fosters the goals Congress sought to achieve without needlessly burdening the federal courts and without imposing the harsh sanctions of RICO by applying it to activities it was never intended to encompass. The construction posited by the Petitioners, therefore, recognizes that Congress wanted to weave the "RICO net" with holes small enough to keep the "minions of organized crime"[21] from escaping, but not so small that even the minnows are caught. The best gauge of the mesh Congress intended comports with the plain meaning of the statute which should not be haphazardly enlarged or reduced by courts.

RICO injuries are recognizable in violations of Section 1962(c) if that provision is held to the plain meaning of

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20. See discussion of cases where actual RICO injuries were present *infra* at pages 27 to 29.

21. *Sutliff, Inc.* v. *Donovan Cos,* 727 F.2d 648, 654 (7th Cir. 1984) ("Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings").

its terms.[22]In fact, there have been several cases which the Seventh Circuit implicitly recognized Section 1962(c) violations arising from a pattern of racketeering activity integrally permeating to the management of the enterprise's affairs.[23] For instance, in *Schacht* v. *Brown,* 711 F.2d 1343 (7th Cir.), *cert. denied,* 104 S.Ct. 508 (1983), defendants were charged with orchestrating a scheme to defraud the Director of Insurance through the operation of an insurance holding company by covering up the insolvency of one of its subsidiary companies. Consequently, the pattern of racketeering activity, which included deliberate overstatements of reserves, falsification of financial statements, fake reinsurance, and illegal dividends, provided the means by which the defendants directed the holding company-enterprise's affairs. Accordingly, the *Schacht* court aptly noted that:

> [I]t is ARC's operation in such a manner as to artificially prolong the operation of Reserve, not the mail fraud itself, which is separately underscored by the Director as the gravamen of the complaint . . . Thus, we find that the causal nexus as alleged easily satisfied the requirements of §1964(c).

711 F.2d at 1352.

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22. One of the most frequently voiced criticisms of courts and commentators opposed to requiring a "RICO injury" is that a RICO injury is not easily defined. *See, e.g., Laterza* v. *American Broadcasting Co.,* 581 F. Supp. 408, 414 (S.D. N.Y. 1984); *In re Catanella & E.F. Hutton & Co. Securities Litigation,* 583 F. Supp. 1388, 1437 (E.D. Pa. 1984); *Slattery* v. *Costello,* 586, F. Supp. 162, 167 (D.D.C. 1983).

23. It is therefore ironic that the court below questioned Petitioners' ability to offer a simple definition of "RICO injury" even though it candidly admitted that "it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest rates by a commercial bank" 747 F.2d at 399. (App. A-29). The Seventh Circuit's attempt to shift the burden to Petitioners to define a RICO injury puts the shoe on the wrong foot. The burden of establishing that a statute's language should be construed to mean something other than the usual and plain meaning of the words used is on the party urging the adoption of an interpretation contrary to the plain meaning of its language. *Cf. Bread Political Action Committee* v. *Federal Election Committee,* 455 U.S. 577, 581 (1982).

Similarly, *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984) and *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983), involved pervasive fraudulent schemes which entailed each defendant's use of the underlying predicate acts of racketeering as an integral part of the enterprise's affairs. For example, in *Sutliff*, the fraud involved infiltrating the enterprise by stripping it of its funds and leaving its creditors with uncollectible accounts — i.e., a classic "bust-out." 727 F.2d at 651. Likewise, in *Bunker Ramo* the defendants created and managed an elaborate enterprise engaged in falsifying orders, invoices and delivery receipts, bribery and payment of goods never received. 713 F.2d at 1285-1286. The acts of racketeering were once again central to the operation of the enterprise. *Id.*

Significantly, *Sedima* has characteristics akin to those in *Sutliff* and *Bunker Ramo* — i.e., a mail fraud, which involved sending inflated costs and fraudulent invoices, was an indispensable factor in the defendant's management of the enterprise's affairs. In contrast, ANB's purported mail fraud, the mailing of notices of the changes in its announced prime rate, is neither central nor significant to the management of the bank's business.

"RICO injuries" therefore do emerge from the plain meaning of Section 1962 as illustrated by the injuries which were proximately caused by the violations of Section 1962 in *Schacht, Sutliff* and *Bunker Ramo*. In fact, in each of those cases, the Seventh Circuit without saying so endorsed the RICO injury test espoused here—an injury proximately

caused by a violation of 1962.[24] The flaw in the Seventh Circuit's analysis is this case occurred because it attempted to define the requisite RICO injury, as such, instead of the actual RICO violation. Moreover, the Seventh Circuit fell into the trap laid by the Second Circuit in assuming that a "meaningful distinction between injury from the predicate acts and injury from the pattern of racketeering activity" will always exist. 747 F.2d at 396-97.[25] (App. A-24).

Section 1964 does not, however, necessarily demand that the injury be different from an injury suffered by the underlying predicate acts. What it requires is an injury caused by a "violation of section 1962." Thus, if the RICO violation is established and it is determined that the plaintiff was injured by reason of the violation, a court need not draw a finer line and differentiate between the injuries caused by the underlying acts and those caused by the Section 1962 violation.[26]

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24. RICO injuries are, of course, not unique to the Seventh Circuit. *See, e.g., Alexander Grant & Co.* v. *Tiffany Industries*, 742 F.2d 408 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3541 (U.S. Jan. 2, 1985) (No. 84-1084) (enterprise was conducted through a pervasive scheme of mail and wire fraud enabling it to remain in business and injure plaintiff which provided accounting services for a greater time than if the fraud had not occurred); *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657) (over a nine year period enterprise conducted through bankruptcy fraud, frivolous litigation, bribery and corruption of state court judges); *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified en banc*, 710 F.2d 1361, *cert. denied*, 104 S.Ct. 527 (1983) (defendants' retirement community was fraudulently promoted with material misrepresentations and managed through the defendants' breaches of fiduciary duty and self-dealing).

25. *Sedima*, 741 F.2d at 496 ("plaintiff must always "show injury different *in kind* from that occurring as a result of the predicate acts themselves") (emphasis added). *See also Bankers Trust*, 741 F.2d at 516.

26. Indeed, this Court has recognized the elusiveness of the proximate cause test, stating that it is:

> virtually impossible to announce a black letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

Associated General Contractors v. *California Council of Carpenters*, ___U.S.___, 103 S. Ct. 897, 908 (1983).

CONCLUSION

There is no single definition of "RICO injuries." They are as numerous and as varied as the myriad predicate acts of Section 1961 and their requisite integration into violations of Section 1962. The absence of predictable harm, however, does not mean that a RICO injury is not required. If such a violation of Section 1962 is alleged, the requisite injury is present when and only if the plaintiff's injury was proximately caused by the violation, not the predicate acts which are but one component of the violation.

In this case Respondents have failed to allege anything more than predicate acts of mail fraud because ANB allegedly misrepresented its prime rate. Accordingly, the order of the Court of Appeals for the Seventh Circuit should be reversed and the District Court's order affirmed, dismissing the Respondent's Amended Complaint for failure to state a claim upon which relief can be granted.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 84-822

AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Interest of Amicus*

In recent years, governments on all levels—federal, state and local—have increasingly recognized the remedial value of civil sanctions to combat pervasive fraud committed against the public. No longer satisfied with the mere imposition of criminal penalties against wrong-doers, municipal entities are now seeking to return the ill-gotten gains of those who corrupt our institutions to the public treasury. Toward that end, Amicus, County of Suffolk, has initiated two civil lawsuits pursuant to, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act of the Organized Crime Control Act of 1970 (RICO) [18 U.S.C. 1961, et seq.]. In *County of Suffolk* v. *Estate of Walsh, et al.,* 81 Civ. 257 (E.D.N.Y.; filed January 27, 1981) [filed sub nom., *County of Suffolk* v. *Walsh, et al.*], Amicus sought damages and recision of certain engineering and construction contracts in a 260 million dollar fraud action which was based on a pattern of corruption and kickbacks in the planning and construction of a billion dollar public works project known as the Suffolk County Southwest Sewer District. Similarly, in *County of Suffolk* v. *Tempera, et al.,* 82 Civ. 2194 (E.D.N.Y.; filed July 26, 1982), Amicus sought approximately four million dollars in damages and recision of certain educational and training contracts as well as recision of certain salary monies paid to a local government official in connection with a pattern of bribery and kickbacks in the award and execution of public contracts funded by the United States Department of Labor.

In these cases, Suffolk County, a municipal corporation and political subdivision of the State of New York, located on the eastern two-thirds of Long Island, New York, with a

* The filing of this brief is pursuant to Rule 36(4) of the Court.

population of approximately 1.4 million persons, has attempted to both relieve the financial burden on taxpayers and in its own behalf and as fiduciary for the United States of America, recoup monies illegally obtained by the wrongful conduct alleged in these suites.

The broad policy question presented in both cases on review herein is the scope and application of the civil RICO statute. As we outline in our argument, the majority opinion in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-648), has, with virtually no statutory or case law precedent, improvidently narrowed the intended reach of RICO by engrafting a prior conviction prerequisite to civil suit under the statute. This decision constitutes an unwarranted restriction on the ability of local and state government to recoup illegally obtained taxpayers' money. Additionally, the *Sedima* majority's engrafting of a so-called "racketeering injury" as an element which the prospective civil RICO plaintiff must prove was an inappropriate enactment of judicial legislation which was correctly rejected in *Sedima's* companion case, before the Court, *Harco, Inc.* v. *American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-822).

Summary of Argument

The scope and purpose of the provisions of RICO and in particular, its civil provisions, 18 U.S.C. 1964(c) is clear—to strip those who engage in racketeering activity of their ill-gotten fruits and thus, provide a remedy to

those innocent parties harmed by such illicit conduct. See, *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981); see also, *Russello* v. *United States*, —— U.S. ——, ——, 104 S.Ct. 296, 302-303 (1983). Notwithstanding the majority's holding in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, No. 84-648, the legislative history and developing case law under this provision demonstrate no requirement of a prior criminal conviction as a prerequisite to suit. Similarly, any judicial attempt to legislate a requirement that plaintiffs in such suit prove a "racketeering injury" as an element of proof precedent to recovery should be rejected. Compare, *Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago*, No. 84-648 with *Sedima, supra.*

ARGUMENT

The remedial provisions of civil RICO [18 U.S.C. 1964(c)] should be liberally construed to reject a requirement of proof of a prior conviction and so-called "racketeering injury" as a prerequisite to suit.

A. The Previous Conviction Requirement

The remedy provided in 18 U.S.C. 1964(c) must, of course, be viewed in light of the statute's legislative history and case law construction. On this basis, Amicus urges a previous criminal conviction plainly is *not* a prerequisite to suit under RICO.

18 U.S.C. §1964(c) provides:

> "Any person injured in his business or property by reason of *a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages

he sustains and the cost for the suit, including a reasonable attorney's fee." (emphasis added).

Analyzing RICO's "language" [*United States* v. *Turkette,* 452 U.S. 576, 580 (1981)] and "literal meaning of the words employed," [*Flora* v. *United States,* 357 U.S. 63, 65 (1958)], Section 1964(c) refers to a "violation" of the standards of Section 1962, and *not* to the criminal penalties of Section 1963. Section 1963 states that acts in violation of it are "unlawful," not criminal.[1] Criminal and civil sanctions are supplied to violations of Section 1962 by Section 1963 (criminal) and Section 1964 (civil).

Accordingly, Amicus respectfully maintains that any construction of RICO which requires a prior "RICO conviction" as defined in 18 U.S.C. 1962 is an incorrect narrowing of the statute's scope and purpose. Simply stated, there is no reason to "depart . . . from and limit . . . the statutory language." *United States* v. *Turkette,* 452 U.S. 576, 581 (1981) (apropos of scope of "enterprise"). Thus, the broad construction suggested by petitioner Sedima with respect to the prior conviction question "is neither absurd nor surprising." *Id.* at 537.[2]

1. Contrary to the *Sedima* majority's inference [741 F.2d at 501-502] civil RICO is *not* a criminal statute in any sense. It does not make criminal, conduct that before its enactment was innocent, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. Its standards of "unlawful" conduct are in fact sanctioned by criminal *and* civil remedies. RICO is, in short, a "remedial" statute. 84 Stat. 947 (1970) ("remedial purposes" warrant "liberal" construction). See, *United States* v. *Frumento,* 563 F.2d 1083, 1090-1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see also, e.g., *State Farm Fire & Cas. Co.* v. *Caton,* 540 F.Supp. 673, 675 (N.D.Ind. 1982).

2. Indeed, any other construction of Section 1964 flies, not only i nthe face of the liberal construction directive noted supra at fn. 1, but also RICO's explicit statement of findings and purpose. 84 Stat. 922-23 ("illegal use of . . . fraud" "enhanced sanctions and new remedies"). Thus, if this Court accepts such a construction on Section 1964 cases, the class of injured persons entitled to sue even outside those in the public sector as noted, *infra,* would be sharply curtailed. In following the antitrust model by providing a cause of action for injured persons, Congress "created . . . the civil suit under Section . . . [1964] precisely for the purpose of encouraging *private* challenges to violation." *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 344 (1979) (emphasis in original) (apropos of section 4 of the Clayton Act). "Private suits" were thought to "provide a significant *supplement* to the limited resources available to the Department of Justice . . ." (emphasis added). *Id.* See, *United States* v. *Borden Co.,* 347 U.S. 514, 518 (1954) (private suits under section 4 "designated to be *cumulative,* not *mutually exclusive*") (emphasis added). A narrow construction of Section 1964 would undermine those "salutary purposes." *United States* v. *Parness,* 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (apropos of "enterprise").

(footnote continued on next page)

Congress intended that civil litigants ("persons") be given a cause of action for relief in cases in which a defendant, through an "*indictable*" or "*chargeable*" "pattern of racketeering" [18 U.S.C. 1961(1)(a) and (b) (emphasis supplied)] had caused injury to a plaintiff. Simply stated, these words "mean just what they say" [*Sedima,* 741 F.2d at 504 (Cardimone, J. dissenting)]; there is no requirement that either a United States Attorney or a state prosecutor have obtained a conviction as a threshold requirement to suit under this statute.

Thus, the narrow holding of *Sedima* would, at the very least, be wholly inconsistent with the case law as it has developed since RICO's enactment in 1970. For example, in *United States* v. *Cappetto,* 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), one of the first reported civil RICO cases, the Government began an injunctive action against the defendant under Section 1964 (a) and (b). Section 1964(a) grants equity jurisdiction to federal courts to prevent and restrain "violations of Section 1962." The Government in Section 1964(b) is explicitly

authorized to "institute proceedings" under Section 1964 (a). No prior criminal conviction had been obtained. The court observed:

> "[A]cts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enforce those acts is not rendered criminal in character by the fact that the acts are also punishable as crimes . . . The relief authorized by . . . [Section 1964]." 502 F.2d at 1357.

Similarly, in *Farmers Bank of State of Delaware* v. *Bell Mortgage, Corp.*, 452 F.Supp. 1278 (D.C.Del. 1978), a private civil damage action was brought under Section 1964. The defendant objected that he had "not [been] convicted . . ." 452 F.Supp. at 1279. The court held:

> "Section 1964(c) . . . does not condition . . . [a] cause of action in any way upon a previous conviction under the criminal provisions of the statute. It is only necessary that the plaintiff provide elements of the Act by a preponderance of the evidence in order to be awarded damages in a civil action." 452 F.Supp. at 1280.

Interestingly enough, prior to *Sedima*, the Second Circuit at least in dicta held that criminal convictions were not necessary [*Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 19, fn. 15 (2d Cir. 1983), cert. denied, *sub nom., Moss* v. *Newman*, —— U.S. ——, 104 S.Ct. 1280 (1984)], which determination was specifically reached as holding in the Sixth and Seventh Circuits. *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983), *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94,

95 fn. 1 (6th Cir. 1982); see also, *Bennett* v. *Berg*, 685 F.2d 1053, 1063-1064 (8th Cir. 1982), aff'd 710 F.2d 1361 (8th Cir. 1983) (en banc); *Owl Construction Co., Inc.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984); cf., *Alexander Grant and Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413, fn. 11 (8th Cir. 1984) (issue not reached). Indeed, the *Sedima* majority conceded that virtually every prior case to have definitively ruled on the question held that a previous criminal "RICO" conviction was not necessary as a pre-condition to the filing of an efficacious civil RICO suit. *Sedima*, 741 F.2d at 496-498 and cases cited at fns. 42-43; see also, Cardimone, J., dissenting in *Sedima* at 504-505); see also, *Bennett* v. *E. F. Hutton Co., Inc.*, 597 F.Supp. 1547, 1556-1558 (N.D.Ohio 1984) (rejecting *Sedima*).

The *Sedima* majority's announcement of the previous conviction requirement would seem to have been based, at least in part, on a reaction to a perceived flood of so-called "garden variety" civil-RICO lawsuits [see, *Sedima*, 741 F.2d at 408, 503]. We suggest that such a theory inappropriately serves to judicially repeal civil RICO in many cases contrary to strong Congressional intent[3] and thus, in essence "throw the baby out with the bathwater."[4]

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3. See analysis of civil RICO's legislative history contained in McClellan, *The Organized Crime Control Act (S.30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L.Rev. 55 (1970); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts, Criminal and Civil Remedies*, 53 Temple L.Rev. 1009, 1014-1015 (1980); see also, Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L.Rev. 237, 249-250 (1982).

4. We note that there, in fact, are predicate criminal convictions underlying the racketeering activity complained of in both civil RICO cases filed by the Amicus Suffolk County in the civil RICO cases it is a party litigant [*United States* v. *Walsh*, 700 F.2d 846 (2d Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 984 (1983); and *People* v.

(footnote continued on next page)

Amicus, along with various other municipalities and state governments, suing as "persons" under 18 U.S.C. 1964(c), has sought to utilize the civil RICO's provisions in the civil forum for the public interest [see e.g., *United States* v. *Sells Engineering, Inc.*, —— U.S. ——, - ——, 103 S.Ct. 3133, 3161-3162 (1983), (Burger, C.J., dissenting); *Matter of District Attorney of Suffolk County,* 58 N.Y.2d 436, 445 (1983)] to recover ill-gotten monies to the taxpayers and thus strip violators of the fruits of their criminal activities. See, e.g., *Alcorn County* v. *United States Interstate Supplies, Inc.,* 731 F.2d 1160 (5th Cir. 1984); *State of New York* v. *O'Hara,* 595 F.Supp. 1101 (W.D.N.Y. 1984); *Gerace* v. *Utica Veal Co.,* 580 F.Supp. 1465 (N.D.N.Y. 1984); *County of Cook* v. *Midcon Corp.,* 574 F.Supp. 902 (N.D.Ill. 1983); *County of Cook* v. *Lynch,* 560 F.Supp. 136 (N.D.Ill. 1982); *Municipality of Anchorage* v. *Hitachi Cable, Ltd.,* 547 F.Supp. 633 (D.Alaska 1982); *Maryland* v. *Buzz Berg Wrecking Co.,* 496 F.Supp. 245 (D.Md. 1980); *City of New York* v. *Arnmart Wholesale Beer Distributors, Inc.,* 83 Civ. 9263 (S.D.N.Y. 1983); *City of New York* v. *Bandolene Fuels, Inc.,* 81 Civ. 1240 (E.D.N.Y. 1981); *City of Milwaukee* v. *Hansen,* Civ. No. 77-246 (E.D.Wisc. 1981); see also, Shaw, *Use of RICO's Civil Remedies by State, Local*

Tempera, 94 A.D.2d 987 (2d Dep't 1983)]. Nonetheless, in *County of Suffolk* v. *Estate of Walsh,* supra, the District Court has stayed all proceedings pending the resolution of the cases, *sub judice* in this Court. However, "limit[ing] private RICO" because there are no "prosecutorial guidelines" as in criminal RICO [*Sedima, supra* at 497], should not be a function of our appellate courts when Congress has clearly spoken to the contrary. Such a restriction with absolutely no guidance as to its ultimate scope [see, *Sedima, supra* at 503], would, with virtually no precedent, precondition all civil RICO suits, on prosecutorial discretion. This in turn is a function of a commitment of limited resources in cases where a government's priorities and responsibilities may necessarily differ in either the criminal or civil forum.

Governments, New York Law Journal, June 14, 1982 at pp. 1 and 3.

Thus, while we are certainly not persuaded that in at least public sector litigation, as one court has noted in general, RICO has "created a runaway treble damage bonanza for the already excessively litigious" [*Schacht* v. *Brown,* 711 F.2d 1343, 1361 (7th Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 508 (1983); see also, *Sedima, supra,* at 786], where Congress has spoken in "clear and unambiguous terms" on the matter [cf., *Furman* v. *Cirrito,* 741 F.2d 524, 532 (2d Cir. 1984), application for cert. pending, No. 84-604], statutory enactment by bald judicial fiat to narrow civil RICO on this question is plainly inappropriate.

As Judge Cardimone [dissenting in *Sedima,* 741 F.2d at 505] succinctly observed, "the simple explanation for [the] resounding rejection of any prior conviction requirement," [in all previous cases] is that "*it does not appear in the statute*" (emphasis supplied).

It is for this reason, we respectfully maintain, that only days after *Sedima,* a different Second Circuit panel suggested that *Sedima* had improvidently and without authority, restricted the plain meaning and intent of civil RICO as enacted by Congress. *Furman* v. *Cirrito,* 741 F.2d at 531-532; see, Note, Civil RICO: *The Temptation and Impropriety of Judicial Restrictions,* 95 Harv.L.Rev. 1101, 1118-1121 (1982); Strafer, Massimi and Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling",* 19 American Criminal L.Rev. 655 (1982); see also, *Bennett* v. *Berg,* 685 F.2d at 1064 ["it is beyond our authority to restrict the reach of the statute"].

B. The "Racketeering Injury" Requirement

The "racketeering injury" requirement promulgated in *Sedima* similarly has no basis in the language of the statute or in its legislative history. Further, this requirement, especially as interpreted by the Second Circuit in the companion case of *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) [application for cert. pending No. 84-657], would have a negative impact on future civil RICO actions,[5] simply because this standing requirement is incapable of any meaningful definition which does not re-introduce the discredited organized crime nexus requirement through the back door.

While the *Sedima* court suggested that the language of §1964(c) is ambiguous, and therefore, open to judicial interpretation [741 F.2d at 486-488], another Second Circuit panel only two days later in *Furman* v. *Cirrito,* 741 F.2d 524 (2d Cir. 1984), found that it was not:

> "To us the language of §1964(c) is clear. It contains no requirement for a 'racketeering enterprise injury;' nor does it limit the protected injury to one sustained 'by reason of' the racketeering enterprise; it grants civil relief for 'injury,' which logically includes any injury, 'by reason of a violation of §1962.'" 741 F.2d at 523.

Indeed, as we have previously argued, it is clear that the *Sedima* court based its finding of §1964(c)'s ambiguity on nothing more than it's own judicial unhappiness with the

5. We note that in both actions filed by Amicus County of Suffolk, long before *Sedima,* injury due to racketeering activities of the nature suggested in that case was in fact pleaded. However, aside from whether or not civil RICO should properly have such a standing rule, as discussed *infra, Sedima* has outlined no criteria for evaluating such a requirement.

impact of the statute, as written, upon alleged fraud involving "respected and legitimate enterprises." 741 F.2d at 487.

With respect to the legislative history of civil RICO concerning this issue, the *Sedima* court suggested that there is nothing but "clanging silence." But see, Amicus's brief, *supra,* fn. 3. The central problem involved in the "racketeering injury" requirement, however, lies in defining and applying the term. As the Seventh Circuit in *Haroco* has observed, those courts which have sought to impose this requirement have been unable to formulate a meaningful definition. 747 F.2d at 387-389. Indeed, the *Sedima* court has done little more than state that a racketeering injury is something more than the proximate results of the RICO predicate acts, and must be caused by activity of a kind which RICO was designed to deter. 741 F.2d at 495-496. To make matters even more clouded, in the *Sedima's* companion case, decided one day later, *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) (application for cert. pending, No. 84-657), the Second Circuit required that this "something more" result from all of the essential elements of the RICO violation. 741 F.2d at 515-517.

The Second Circuit's definition of "racketeering injury" thus offers no practical guidance to the potential governmental or private plaintiff, or to courts faced with motions for the dismissal of otherwise meritorious civil RICO actions. Litigants are left with little more than an "I know it when I see it" standard [see, *Haroco,* 747 F.2d at 389, citing *Williamette Savings & Loan* v. *Blake & Neal Finance Co.,* 577 F.Supp. 1415, 1430 (D.Ore. 1984); *Waste Recovery Corp.* v. *Mahler,* 566 F.Supp. 1466, 1468-1469 (S.D.N.Y.

1983)], and the implication in *Sedima* is that the court will know and sustain civil RICO actions only when La Cosa Nostra, the Mafia or similar organized crime groups are involved. Thus, the "racketeering injury" requirement has brought RICO jurisprudence full circle to the "organized crime nexus" requirement rejected, as noted in *Haroco,* 747 F.2d at 394-395, in *Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1982) and those cases cited in *Sedima, supra* at fns. 31 and 32.

The potential damage caused by the "racketeering injury" requirement extends even to those cases in which "mobsters" are involved. There is nothing magical about the involvement of "mobsters" which will conjure up the additional consequential injuries suggested as requisite to a valid civil RICO suit by *Sedima* and *Bankers Trust.* Even in cases in which there has been a successful criminal RICO prosecution of a "mobster," under the *Sedima/Bankers Trust rule,* argument will be made that the subsequent civil RICO action should fail, if, as is often the case, the only injuries are those caused by the predicate acts. Thus, the *Sedima/Bankers Trust* standard does not even serve to focus civil liability upon those whom it identifies are the prime targets of RICO and thus, does not fulfill RICO's civil objectives as a statute which was "deliberately" drafted to be "extraordinarily broad." *Haroco,* 747 F.2d at 390.

It is clear from the above that reversal of *Sedima* and affirmance of *Haroco* is appropriate, both to avoid violence to the statutory language and to preserve the civil remedy which Congress intended to give to "persons," and in particular, governmental institutions, who have been fraudulently victimized by organized patterns of criminality.

Conclusion

Civil RICO [18 U.S.C. §1964(c)] should be liberally construed as Congress intended to permit viable causes of action without previous criminal convictions and without pleading and proof of "racketeering injury."

Dated: February 15, 1985

Respectfully submitted,

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AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF THE INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF AMICUS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Interinsurance Exchange of the Automobile Club of Southern California respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as amicus curiae.

Respondent Haroco, Inc. has consented to the filing of this Amicus Brief; Petitioner American National Bank & Trust Company of Chicago has refused consent.

INTERESTS OF AMICUS CURIAE

This brief is submitted by the Interinsurance Exchange of the Automobile Club of Southern California ["EXCHANGE"].

The EXCHANGE insures over one million automobiles in the State of California through over 650 thousand policies. The EXCHANGE is the 12th largest automobile insurance carrier in the United States. ***Best's Aggregate and Averages, Private Passenger Automobile Ranking for 1983***, 58 (1984 45th ed.). The EXCHANGE is the plaintiff in a civil RICO action now pending in the United States District Court for the Central District of California, *Interinsurance Exchange v. Delug, et al.*, Civ. No. 84-8651 (MAP) (filed November 8, 1984).

This case involves a claim that Petitioner Bank's practices of keying certain of its loans to the "prime rate" constituted a violation of Title IX of the Organized Crime Control Act of 1970 (RICO). Both Petitioner and Amicus American Banking Association have emphasized the inappropriateness of using civil RICO to address what is characterized as an "ordinary, run of the mill" business dispute.

Amicus is a member of an industry which has a vital need to preserve civil RICO as a means to combat the enormous and increasing costs imposed on society and the insurance industry by insurance fraud. These costs, frequently imposed by persons engaged in organized criminal enterprises, are ultimately passed on to consumers [insureds] in the form of higher premiums. These insureds have no recourse against these illegitimate

enterprises. Insurers, on behalf of their insureds, believe that civil RICO is an effective remedy against these illegitimate enterprises. Amicus requests permission to present the arguments in the attached Brief, arguments keyed to the needs of the insurance industry, arguments in favor of preserving RICO as a viable civil remedy which may be used to attack root and branch the cancer of insurance fraud.

WHEREFORE, it is respectfully requested that the Court grant leave to the Interinsurance Exchange of the Automobile Club of Southern California to file the attached Brief as Amicus Curiae.

Respectfully submitted,

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No. 84-822

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondents.

MOTION OF THE INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF AMICUS

This brief is submitted by the Interinsurance Exchange of the Automobile Club of Southern California ["EXCHANGE"].

Insurance fraud has been calculated to cost the American public in excess of 11 billion dollars a year. Insurance losses due to fraudulent claims are proliferating. Indeed, the American Insurance Association

estimates that 15-20 percent of all insurance claims are fraudulent.[1] Automobile insurance fraud alone is costing American consumers 5 billion dollars annually, and over 1.5 billion dollars in California. *County of Los Angeles, Blue Ribbon Committee on Automobile Insurance* 19 (Final Report 1984). Many of these fraudulent claims contribute to caseload congestion that afflicts both state and federal courts to the detriment of legitimate users of the civil adjudicatory system.

With increasing frequency insurers are relying on the civil remedies contained in Title IX of the Organized Crime Control Act of 1970 (RICO) to attack insurance fraud by focusing on those whose combined efforts result in illegal insurance claims.

Amicus has a strong interest in assuring that the decisions rendered by this Court in *Sedima S.P.L.R. v. Imrex Co., Inc.*, No. 84-648 and *American National Bank of Haroco,* No. 84-822, be made with recognition that a wide range of illegitimate conduct supports recourse to RICO. Too much has been already made by some courts of the perceived misuse(s) of RICO, based in large part, on the identity of the defendants.[2] Amicus

[1]New York Times, July 6, 1980, at 27, col. 1, at 28, col. 4 (from G. Patrick Riggs of the American Insurance Association). In Los Angeles County, staged accidents alone are projected to be between 100-200 million dollars a year. *County of Los Angeles, Blue Ribbon Commission on Automobile Insurance,* 19 (Final Report 1984). *See generally,* Blakely, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 344-45 (1982) (collecting statistics on damages resulting from fraud and other offenses).

[2]Thus, the circuit court in *Sedima S.P.L.R. v. Imrex Co., Inc.* 741 F.2d 482, 487 (2d Cir. 1984) stated:

> Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized business people. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch [footnote omitted], to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

respectfully submits that the correctness of the application of a statute turns not on the name of the defendant but on the determination of whether the conduct complained of is addressable by the statutory scheme.

No insurer willingly pays fraudulent claims. Existing patterns of insurance fraud make detection difficult. The combination of claimants, doctors, lawyers, and their insiders helps to create a strong facade of respectibility to the claims. And even when the facade is cracked in individual cases, the dismissal or abandonment of the fraudulent claim becomes simply a cost of doing business to the enterprise. Civil RICO provides insurers with the means to seek out and destroy these illegal enterprises.

SUMMARY OF THE ARGUMENT

The proper construction and application of the private remedies contained in RICO have generated considerable opinion writing and disagreement among the Circuits. The two cases now before this court, *Haroco v. American National Bank,* No. 84-822, and *Sedima S.P.R.L. v. Imrex Co.,* No. 84-648[3], exemplify this disagreement and division.

[3]The conviction requirement suggested by the Second Circuit in *Sedima* is not involved in the *Haroco* decision. Amicus supports in full the arguments made by the States who joined in the Amicus Brief in Support of Petitioner in *Sedima S.P.L.R. v. Imgex Co., Inc.,* No. 84-648 (Brief filed Feb. 28, 1985).

Some courts, perhaps unhappy with the extension of RICO's private remedies to what those courts have characterized as "garden variety fraud," and concerned with the prospect of perhaps an unwise use of RICO in particular cases, have offered strained interpretations of the language of RICO.[4] These courts have discarded a contextually more likely interpretation for a less plausible one which is more consistent with *their* view of the benefits and wisdom of RICO. Such an attitude characterizes the *Sedima* case now before this Court. The Seventh Circuit on the other hand correctly recognized its institutional responsibility, as stated by this Court in *Tennessee Valley Auth. v. Hill,* 437 U.S. 153 (1978), to apply the statute as written and not engage in judicial revisionism of legislative history to avoid plain statutory language. 747 F.2d at 398-99. The polestar of statutory construction is not judicial appreciation of the wisdom or lack thereof in a statute, but rather the language of the statute itself. As most eloquently expressed by Justice Jackson, statutory construction must proceed "by analysis of the statute instead of by psychoanalysis of Congress." *United States v. Public Utilities Comm'n,* 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

It is evident that some lower courts, and the Second Circuit in particular, have impiemented their concerns over the wisdom and appropriateness of civil RICO via a strained and unnatural construction of RICO's causation requirements. This strained construction has been followed by petitioner by its treating as interchangeable the causation element in Section 1964(c) of RICO and the language in Section 1962(c) which defines and describes the substantive elements of a RICO cause of action. It is Amicus' contention that any construction

[4]These cases are collected in the *Sedima* and *Haroco* decisions (*passim*).

of RICO must begin with the simple differentiation between the causation requirement set forth in Section 1964(c) and the definition of RICO offenses in Section 1962. This distinction is not only consistent with the stated goals and purposes of RICO, but will also avoid the confusion that has been engendered by appellate court decisions which seek to ascribe some mythology and magic to the causation requirement contained in Section 1964(c).

Amicus further disagrees with the contention that a private civil RICO action requires pleading and proof that an "integral relationship" exists between the pattern of racketeering activity and the conduct of the enterprise's affairs. Petitioner's Brief, p.17. The "integral relationship" contention has not been used in criminal RICO cases. Since Section 1962(c) is common to both criminal and civil RICO prosecutions, adoption of the "integral relationship" test would put at risk prior criminal RICO convictions. The "integral relationship" test would also reduce the scope and effectiveness of RICO by limiting RICO's application whenever the central purpose of the enterprise was not wholly illegitimate.

A. A Person is Injured in his Business or Property by Reason of a Violation of Section 1962 Whenever His Injury is Fairly Traceable to the Conduct that Constitutes the Violation of Section 1962.

Much has been made of the use in Section 1964(c) of the phrase "injury to business or property by reason of a violation of Section 1962." The lower courts have read the "by reason of" language as requiring anything from competitive injury to racketeering injury to simple causation established by reference to the commission

of the underlying predicate acts.[5]

The issue before this Court is what type of causation requirement is created by the phrase "by reason of a violation of Section 1962." Three positions are being offered. First, Amicus contends that the natural reading of that language only requires that the injury to business or property be fairly traceable to the conduct of the defendant that constitutes the activity proscribed by Section 1962.[6] Second, Petitioner contends that the "by reason of" language gives rise to a proximate cause requirement that in turn requires a showing that there exists an "integral relationship" between the pattern of racketeering activity and the conduct of the RICO enterprise. Third, the Second Circuit in *Banker's Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *pet. for cert. pending,* 53 U.S.L.W. 3367 (Oct. 24, 1984) articulated the requirement that the "by reason of" language requires a showing that the RICO plaintiff's injury was caused exclusively by the fact of a violation of Section 1962; if any of the injury was a consequence of the conduct leading to a violation of Section 1962, no private action under RICO is made out.

1. Section 1964(c) Imposes a Simple Cause in Fact Requirement.

The legal standard to be applied here has been frequently stated by this Court. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their

[5]*See Haroco, Inc. v. American National Bank,* 747 F.2d 384, 387-89 (7th Cir. 1984) and *Sedima S.P.L.R. v. Imrex Co., Inc.,* 741 F.2d 482, 492-94 (2d Cir. 1984) (collecting cases).

[6]This Court has frequently used the term "fairly traceable" when defining the cause in fact requirement. *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978) (standing).

ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979). Construing "by reason of" is not a Herculean task. There can be little doubt but that the phrase "by reason of" simply imposes a traditional cause in fact requirement on a civil RICO plaintiff.

The phrase "by reason of"[7] is a derivation of the term "by" and synonymous with that term and such phrases as "by means of." *See* Oxford English Dictionary, p. 1231 (VII In Phrases). The legal interchangeability of the term "by" and phrases "by reason of" and "by means of" has been frequently noted. *See* 5A Words & Phrases, p. 824 (1968). Roget's *Thesaurus* identifies "by reason of" as a preposition whose linguistic idea is paralleled by such terms as "by the act of", "through the medium of", "by", "through". Roget's *International Thesaurus,* p. 429, 656.8 (3d ed. 1962). The phrase "by reason of" plainly conveys the requirement of a causal link between the language immediately before it "(injury to business or property") with the language immediately after it ("violation of §1962"). This simple statutory cause in fact requirement fulfills the statutory purpose of identifying those persons who have been significantly affected by the challenged *conduct.*

[7]The phrase "by reason of" is not generally separately defined in dictionary texts. The parallel term "by" and the parallel phrase "by means of" are defined. The term "by," as used in Section 1962(c) is a term which when used as a preposition is followed by a word or phrase naming the causative agent, means, or instrumentality. Webster's Third New International Dictionary, p. 307; American Heritage Dictionary of the English Language, p. 182. A similar definition is provided for the phrase "by means of." Webster's Third New International Dictionary, p. 307 ("By means of" is a preposition which means "through the agency or instrumentality of.")

2. There Is No Basis For Limiting Civil RICO Actions To Injuries Resulting Exclusively From The Fact Of A "Violation" Of Section 1962.

The position that a causal link must exist between the injury and the fact of "violation" of Section 1962 is addressed in *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *pert. for cert. pending,* 53 U.S.L.W. 3367 (Oct. 24, 1984). The essence of the circuit court's decision in *Bankers Trust Co.* is that a civil RICO action cannot be stated unless the "injury to business or property" is caused exclusively by the fact of a "violation of §1962". *Id.* at 517.

This Court, in evaluating the "by reason of a violation" language must recognize that *conduct* and not the violation of a statute causes injury. The finding that a statutory violation has occurred is a legal conclusion applied to underlying conduct. The conduct not the violation gives rise to the injury sustained by the plaintiff. There is no reason to believe that Congress intended that the causation element require proof of injury traceable to the abstraction known as a violation of a statute rather than proof of injury traceable to the conduct which itself constitutes the violation. As noted by Justice White last term in *Escondido Mutual Water Company v. La Jolla,* __ U.S. __, 104 S. Ct. 2105, 2110 (1984):

> [I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses. . . .

If this Court holds that plaintiff must establish a cause in fact linkage between the injury to business or property and the fact of a violation, it would be impossible for any civil RICO plaintiff to prevail absent the most absurd

and unusual circumstances. For example, where the claim arises from a staged accident or the claim is wholly fictitious, the injury to the insurer is direct and results from investigation or payment, or both, of the claim. In neither case is it realistic to say that the injury is the exclusive result of the abstraction known as a violation of Section 1962(c). Thus, under *Banker's Trust Co.,* such injuries would not be compensated under civil RICO because while the injuries are the direct result of the conduct proscribed by §1962(c), that consideration is irrelevant under the theory of liability espoused. Under *Banker's Trust Co.,* the only potentially qualifying injury would be if the costs of fraud investigation and payments lead to an increase in rates, leading to a decrease in customers, leading to a loss of profits (See examples noted at 741 F.2d at 517.) To contemplate that Congress intended civil RICO would reach only such indirect and remote injuries puts a whole new tilt to the concept of causation. It can hardly be accepted that Congress explicitly adopted a private right of action, a right of action which forms an integral part of the overall attack on organized criminal activity set forth by Title IX of the Organized Crime Control Act of 1970, and limited its reach *only* to remote injuries attributable to RICO offenses, such as those described here and in *Bankers Trust Co.*

3. Section 1964(c) Does Not Create a Proximate Or Legal Cause Requirement that Incorporates Section 1962(c).

Petitioner recognizes the bankruptcy of the argument sounded in *Bankers Trust Co.* (see Petitioner's Brief, pp. 12-13). It argues that Section 1964(c) creates a proximate or legal cause requirement satisfied by petitioner's construction of §1962(c) that a civil RICO plaintiff establish that the RICO defendants controlled, directed or managed the RICO enterprise, or put another

way, that the pattern of racketeering activity be integrally linked with the management and operation of the enterprise's affairs.[8]

The difficulty with this argument is that it converts the simple cause in fact requirement of Section 1964(c) into an amorphous and intrusive proximate cause requirement. The proximate or legal cause concept is a policy-based concept that operates to impose limits on the scope of liability short of that which would be allowed were simple cause in fact the sole criterion. This point is clearly made by Prosser & Keeton:

> The term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

W. Prosser & W. Page Keeton, *The Law of Torts,* 273 (5th ed. 1984).

The proximate cause argument put forward by petitioner[9] rests on a strained, unnatural construction

[8]Petitioner's Brief, p. 11.

[9]The term "proximate cause" was used by the court in *Haroco.* Amicus suggests that the result in *Haroco* was correct and the court did use a cause in fact approach notwithstanding the use of the term "proximate cause":

> This holding by no means renders superfluous the requirement in §1964(c) that the plaintiff be injured "by reason of" a violation of Section 1962. As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of Section 1962 must, directly or indirectly, have injured the plaintiff's business or property. . . . This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.

747 F.2d at 398.

of the phrase "by reason of." Section 1962(c) describes the relationship that must exist between the RICO defendant(s) and the enterprise. Section 1964(c) confers standing on persons to sue for covered injuries. The appropriate construction of Section 1962(c) is not linked to the issue of causation derived from §1964(c). While causation is an element of liability, it does not define liability. This Court should not repeat the mistake noted by Prosser by transmutting the expressed cause in fact requirement of §1964(c) into the amorphous legal cause requirement. W. Prosser & W. Page Keeton. *The Law of Torts,* 272 (5th ed. 1984).

The suggestion that some ill defined proximate cause requirement exists as a brooding omnipresence over civil RICO actions creates the opportunity for much mischief. The doctrine of proximate or legal cause is sensibly applied where liability has been created by the common law process of reasoned elaboration. Courts, having recognized a right of action, legitimately have a role in defining the scope and extent of that right. That argument is not available where, as here, the right of action is created by Congress. It is Congress' perogative to define the scope and extent of the right of action it has created.[10] Lower courts might see this Court's acknowledgment that the proximate cause doctrine exists as an appendage to RICO as providing those lower courts with a license to engage in a free-wheeling

[10]Ironically, the proximate cause requirement is not generally considered to be applicable to fraud cases. *See* W. Prosser & W. Page Keeton, *The Law of Torts,* p. 728 (5th ed. 1984) (stating elements of prima facie case). Since fraudulent conduct permeates so many of the RICO predicate offenses, inclusion of a proximate cause requirement suggests a statutory remedy that would be less advantageous than the common law remedy of fraud. Such a suggestion is not consistent with this Court's decision in *Turkette,* 452 U.S. 576, 585 (1982).

construction of Section 1962. Seen in this light, the proximate cause issue adds nothing to the analysis of a civil RICO cause of action.

B. Section 1962(c) Only Requires That The Conduct That Constitutes the Predicate Acts Be Related to the Activities of the RICO Enterprise.

Section 1962 is the core of civil RICO defining the types of conduct that create liability. Section 1962(c) requires:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Petitioner asserts that §1962(c) requires a showing of an "integral relationship between the pattern of racketeering activity and the conduct of the enterprise's affairs. . . ." Petitioner's Brief, p. 17. Neither the language of Section 1962(c) nor the consistent, overwhelming case law construing Section 1962(c) support Petitioner's assertion.[11]

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[11]One circuit court has agreed with the approach suggested by Petitioner. *See Bennett v. Berg,* 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied,* 104 S. Ct. 527 (1984). The *Bennett* decision is not persuasive. First, it fails to appreciate that its approach is inconsistent with every circuit court that has considered the scope of Section 1962(c). Second, the Bennett court's reliance on the panel decision in *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979) fails to note that the Fourth Circuit (en banc) ultimately affirmed the conviction of former Governor Mandel by an equally divided court. 602 F.2d 653 (4th Cir. 1979). A majority of the Fourth Circuit members of the en banc court would have affirmed the judgments of conviction against *all* contentions, except the jury charge which

Section 1962 does not discriminate against particular types of interaction by "distinguishing between predicate acts which play a major or a minor role, or any role at all, in what may be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise. . . ." *United States v. Stofsky,* 409 F.Supp. 609, 613 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. den.,* 429 U.S. 819 (1976). RICO does not discriminate between near and remote actors or those merely associated with the enterprise. *See United States v. Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom., Delph v. United States,* 439 U.S. 953 (1978). The RICO net is woven tightly to trap the smallest fish, even those peripherally involved with the enterprise.

Indeed, in *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980), (Oakes, J.), *cert. denied,* 452 U.S. 961 (1981), the court specifically rejected an "integral relationship" test. The court noted that Section 1962 "declines to define in qualitative terms the degree of interrelationship between the pattern of racketeering and the conduct of the enterprise's affairs." *Id.* at 54. Petitioner's suggested construction of Section 1962(c) stands in sharp contrast to the uniform, consistent construction Section 1962(c) has received in criminal RICO cases.

Concededly, there is breadth to Section 1962(c); nonetheless, the provision is straightforward: A person may not *conduct* or *participate, directly or indirectly, in the conduct* of the affairs of the enterprise through a pattern of racketeering. 18 U.S.C. Section 1962(c). An "integral relationship" is not compelled by the term "conduct" or the phrase "participate, directly or indirectly, in the conduct." The term "conduct" has a

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was the point of equal division. The discussion of Section 1962(c) in *Mandel* did not involve the jury charge. 591 F.2d at 1374-75.

range of meanings: a strong meaning which includes the concept of management and direction,[12] and a weak meaning which includes the notion of execution or carrying out of tasks. Webster's Third New International Dictionary, p. 473. This Court should give effect to all meanings of the term "conduct."

Section 1962(c) does *not* use the term "manage" or "direct" or "control." Congress thus eschewed more specific terms in favor of a generalized term that encompasses a range of meanings. There is no basis for this Court transforming Congress' general term into the limited term petitioner espouses. This Court should follow the policy adopted in its previous RICO decisions in *Turkette* (452 U.S. 576 (1981) and *Russello* (104 S. Ct. 296 (1983)) of giving RICO terms the broad construction to which they are susceptible, rather than picking out, from the range of meanings, a narrow, restrictive construction.

Even if Congress intended that RICO would be primarily directed toward situations where there was an "integral relationship" between the racketeering activity and the enterprise, it is not a proper judicial function to limit the plain language of a statute to *only* that primary activity. *See U.S. v. Elliott,* 571 F.2d 880, 897 n.17 (5th Cir. 1978). A comprehensive statute should not be gelded under the guise of construction. *United States v. Raynor,* 302 U.S. 540, 552 (1938) (no rule of construction requires that statute be given the "narrowest meaning").

First, a general rule of stautory construction is to interpret the whole statute and not just the particular word or phrase under scrutiny. 2A Sutherland Statutory

[12]Petitioner relies on these strong meanings of the word control to support its contention that there must be an "integral relationship" between the racketeering activity and the enterprise. Petitioner's Brief, p. 17.

Construction, Section 46.05, p. 90 (4th ed.) In this regard, attention should be directed to the language in §1962(c) that extends liability to those who "participate, directly or indirectly, in the conduct. . . ." The term "participate" suggests that the term "conduct" should not be limited to a strong meaning for "participate" suggests "sharing," not control. Webster's Third New International Dictionary, p. 1646. Congress' adoption of a generalized or weak sense of the term "conduct" is also suggested by the qualifiers to the term "participate." To state that a person may participate, "directly or indirectly," in the conduct of the enterprise suggest a level of involvement not necessarily requiring management or control or direction of the enterprise.

The use of the term "through" in Section 1962(c) does not, as petitioner's claim, support the argument that the term "conduct" is used exclusively for its strong meaning. Petitioner's Brief, p. 17. As construed by petitioner, the terms "conduct" and "through" become duplicative and redundant. If the term "conduct" is used in its strong sense, there is no need for the term "through" as that latter term is construed by petitioner. When the terms "conduct" and "through" are used in their more customary, general sense, a more natural reading of Section 1962(c) appears. Under this reading, the term "through" is given its normal meaning as a causal term rather than a qualitative term. *See United States v. Nerone,* 563 F.2d 836, 851 (7th Cir. 1977), *cert. denied sub nom. Helfer v. United States*, 435 U.S. 951 (1978); Webster's Third New International Dictionary, p. 2384 (1 through). This functional meaning is particularly called for where, as in Section 1962(c), the term "through" is used as a preposition, whereas, the meaning urged by petitioner is more appropriate where the term through is used as an adverb. Webster's Third New International Dictionary, p. 2384 (2 through).

Second, the consistent judicial interpretation of Section 1962(c) does not support limiting the term "conduct" to the strong meaning urged by petitioner. *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980) (Oakes, Jr.), *cert. denied,* 452 U.S. 961 (1981) (one "conducts" for purposes of Section 1962(c) when the predicate offenses are related to the activities of the enterprise.)[13]

Third, the breadth Amicus ascribes to the term "conduct" is more consistent with the overall statutory scheme. Section 1962 defines that conduct which determines whether there is substantive liability under the statute. This liability provision is common to both criminal and civil prosecutions. Requiring proof of an "integral relationship" would engender confusion and complexity in RICO prosecutions by deflecting attention away from how the enterprise was operated or manipulated to facilitate racketeering activity toward an inquiry into the structure of the enterprise. RICO prosecutions would be dependent on demonstrating that the RICO defendants had the power, formal or informal, to manage, direct or control the enterprise to accomplish the racketeering activity. Such a construction would not only run counter to the intent of Congress that RICO punish behavior not status (*see* 116 Cong. Rec., part 26, Oct. 7, 1970, p. 35344 (Remarks of Mr. Poff); *United States v. Mandell,* 415 F. Supp. 997, 1018-19 (D. Md. 1976), *aff'd by equally divided Court* 602 F.2d 653 (4th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980)) but also

[13]Even the Fifth Circuit which had a slightly different standard for demonstrating the requisite nexus does not come close to the rigor demanded by petitioner. *See United States v. Cauble,* 706 F.2d 1322, 1333, 1343 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 996 (1984) (RICO defendant's position in enterprise must *facilitate* his commission of the racketeering acts *and* the enterprise must be *affected* by the racketeering activity).

invite RICO participants to create enterprises of byzantine complexity to frustrate and avoid prosecution. Such a construction is not consistent with the acknowledged goals and purposes of RICO "to divest the association of the fruits of its ill-gotten gains. *United States v. Turkette,* 452 U.S. 576, 585 (1980).

Adoption of an "integral relationship" requirement would enable persons who heretofore had been subject to RICO to escape liability. Thus, the union official or public officer who uses his office to facilitate racketeering activity has to date been subject to RICO (*see, e.g., United States v. Provenzano,* 688 F.2d 194, 199-200 (3d Cir.), *cert. denied,* 459 U.S. 1071 (1982) (union official); *United States v. Forsythe,* 560 F.2d 1127, 1135-37 (3d ed Cir. 1977) (public officers)), but could escape liability under petitioner's construction since the racketeering activity was not "integral" to the union or government office. Similarly, in insurance fraud cases that are of concern to Amicus, an "integral relationship" requirement might insulate from liability participants in the scheme who derive a portion of their income from the racketeering activity, but who otherwise carry on a legitimate practice. These participants might not engage in racketeering activity that is "integral" to the enterprise. In large scale insurance fraud rings many of the participants may be remote, though repeat actors, who could not be said to have a management or controlling role. Under petitioner's construction, these persons would profit from their participation in the racketeering activity, but might escape liability under RICO. Petitioner's construction would resurrect the same end this Court declared "unacceptable" in *Turkette:* "Whole areas of "organized criminal activity" would be placed beyond the substantive reach of

[RICO]." 452 U.S. at 589. This Court's comments in *Turkette* are particularly important for they emphasize that it is organized criminal activity, not just "organized crime" of the popular stereotype, that is the object of RICO. *United States v. Turkette,* 452 U.S. 576, 591 (1981). It is the person's affiliation with the enterprise, like a person's involvement in a conspiracy, that raises the greater concern resulting in RICO's sanction. This Court should no more require "integral" involvement in the RICO enterprise that it would require "integral" involvement in a conspiracy.

CONCLUSION

It must be borne in mind that the critical issue addressed by the Seventh Circuit in *Haroco* is that of causation in fact. It is respectfully submitted by Amicus that on that issue the Seventh Circuit ruled correctly—a plaintiff need only show under Section 1964(c) a cause in fact link between injury to his business or property and the conduct that constitutes a violation of Section 1962. It is unnecessary and unwise to confuse this simple issue of cause in fact with the policy issues necessarily implicit in the concept of proximate cause.

It still remains the obligation of every civil RICO plaintiff asserting that a violation of Section 1962(c) has occurred to demonstrate by the requisite burden of proof the correctness of that position. The construction of Section 1962(c) argued for by petitioner, however, is not a correct construction of that provision. Section 1962(c) only requires that the predicate offenses relate to the activities of the enterprise. Any other construction is not only inconsistent with the plain meaning of Section 1962(c), but would jeopardize each criminal conviction

that has previously been secured under the existing construction of Section 1962(c).

Respectfully submitted,

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ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 27, 1985, I served the within *Motion for Leave to File a Brief as Amicus Curiae and Brief Amicus* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

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MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

(8)

No. 84-822

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

No. 84-822

AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO,
A National Banking Association,
Walter E. Heller International Corporation,
and Ronald J. Grayheck

PETITIONER,

v.

HAROCO, INC., A Corporation,
Roman Ceramics, Inc., A Corporation,
California Originals, Inc., A Corporation,
and Mike Wayne Distilled Products Co., A Corporation

RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR AMICI CURIAE
IN SUPPORT OF RESPONDENT

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AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO,

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v.

HAROCO, INC.,

RESPONDENT.

On Writ of Certiorari to the Court of Appeals for the Seventh Circuit

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the States of Arizona, Alaska, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York*, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.**

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*The State of New York wishes to express its support for the positions expressed by Amici without formally joining on the brief.

**The assistance in the preparation of this brief of Professor G. Robert Blakey of the Notre Dame Law School and Blake A. Bailey (Notre Dame '86), Thomas F. Merrick (Notre Dame '86), Christine M. North (Notre Dame '85), Maryellen O'Neil (Notre Dame '86), Donald H. Passenger (Notre Dame '86), Olga F. Pribyl (Notre Dame '85), David C. Scheper (Notre Dame '85), Beth A. Schneider (Notre Dame '86), and Louis J. Weber III (Notre Dame '85), is hereby acknowledged.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Since 1970, twenty-two states, including Arizona, have followed Congress' lead by adopting similar legislation.[1] The states have employed this legislation in criminal prosecutions against a wide variety of illegal conduct.[2] Additionally, both state governments and private plaintiffs have used it in civil litigation.[3] Federal RICO decisions have played a vital role in interpreting and upholding analogous state RICO legislation.[4]

Distressingly, however, recent decisions by the lower federal courts manifest a distinct hostility toward the use of civil RICO.[5] State civil RICO defendants are using these decisions to challenge the state legislation and to urge the narrowing of its scope.[6] In the context of federal litigation

[1] See Appendix A for the text of Federal RICO, citations of the state statutes, and a comprehensive comparison of the federal and state legislation. See Appendix B for a resolution of the National Association of Attorneys General.

[2] *See, e.g., Carlson v. State,* 405 So. 2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey v. State,* 402 So. 2d 1178, 1180 (Fla. 1981) (drugs); *State v. Whiddon,* 384 So. 2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and arson to defraud); *Moorehead v. State,* 383 So. 2d 629, 630-31 (Fla. 1980) (auto theft).

[3] *See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. 589, 591, 667 P. 2d 1304, 1306 (1983) (securities fraud); *Banderas v. Banco Central del Ecuador,* 461 So. 2d 265 (Fla. Dist. Ct. App. 1985) (foreign exchange fraud).

[4] *See, e.g., Baines v. Superior Court,* 688 P. 2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); *Roush v. State,* 413 So. 2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on federal decisions); *Moorehead v. State,* 383 So. 2d at 630-31 (constitutionality of "pattern" in Fla. RICO statute upheld relying on federal decisions.)

[5] *See generally* Horn, *Judicial Plague Sweeps United States 'Resultorientitis' Infects Civil RICO Decisions,* 5 Nat'l L. J., May 23, 1983, at 31, col. 1.

[6] *See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. at 596, 667 P. 2d at 1311 (distinct injury limitation rejected, but urged based on

with pendent state claims, federal courts are also unjustifiably reading limitations into state legislation not intended by the state legislature, threatening to frustrate the legislative design.[7] Amici view these developments as ominous because they threaten the exercise of state sovereignty. A court is "not at liberty to imply . . . condition[s] which . . . [are] opposed to the explicit terms of . . . [a] statute . . .. To [so] hold . . . is not to construe the . . . [statute] but to amend it." *Fedorenko v. United States,* 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 38 (1934)). Accordingly, Amici urge this Court to set its hand firmly against these unconstitutional encroachments of Article I legislative power by Article III courts.

STATEMENT

For the statement of the facts and course of legal proceedings below, the Court is respectfully directed to the briefs of the parties.

federal decisions); *Banderas,* 461 So. 2d at 270 (organized crime limitation rejected; "garden variety" fraud exclusion rejected, but urged, citing *Sedima, S.P.R.L. v. Imrex, Inc.,* 741 F.2d 482 (2d Cir. 1984)).

[7] *See, e.g., Plains Resources, Inc. v. Gable,* Civil No. 83-JM-2145, slip op. at 3-5, (D. Colo. 1984) (organized crime limitation read into federal and Colorado RICO statutes), *appeal pending; Divco Construction & Realty Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 575 F. Supp. 712, 714 (S.D. Fla. 1983) (organized crime limitation read into federal and Florida RICO statutes in securities fraud area).

The judicial hostility seems to be related to the presence of treble damages, which the courts mistakenly construe to be penal. *See, e.g., Saine v. A.I.A., Inc.,* 582 F. Supp. 1299, 1305 (D. Colo. 1984). The multiple damage provisions in federal and state RICO, however, embody the "complete compensation" theory adopted by this Court in *United States v. Bornstein,* 423 U.S. 303, 313-317 (1976) for the multiple damages provisions of the False Claim Act, 31 U.S.C. § 231 (1982). *See generally* Georing, *The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and a Jurisprudence of Labels,* 1 Materials on RICO 428 (Cornell Institute on Organized Crime (1980)). Indeed, some state RICO legislation provides for the recovery of both treble *and* punitive damages. *See, e.g., Banderas,* 461 So. 2d at 267 (award upheld of

One issue is presented:

> Is a private plaintiff's right to recover under civil RICO conditioned on a showing of distinct injury? (no)

Amici have also filed a brief that addresses other issues and related considerations in behalf of petitioners in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, No. 84-648. The Court is respectfully referred to that brief for those arguments.

SUMMARY OF ARGUMENT

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Neither the Organized Crime Control Act generally, nor Title IX particularly, was limited to organized crime. RICO provides for criminal and civil sanctions. Nothing in the text, legislative history, or purpose of RICO, justifies circumscribing its private civil remedies with a distinct injury limitation.

ARGUMENT

I. RICO DOES NOT REQUIRE A SHOWING OF DISTINCT INJURY AS A PREREQUISITE FOR A PRIVATE CIVIL SUIT.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO;" it is codified at 18 U.S.C. § 1964.[8] *Sedima, S.P.R.L. v. Imrex Co., Inc.*,

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treble and punitive damages under Florida RICO). *See also* S. Rep. No. 307, 97th Cong., 1st Sess. 1273 (1981) ("adequate relief or compensation is the main goal").

[8] *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) (hereinafter *Civil Action*); Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 Temp. L. Q. 1009 (1980) (hereinafter *Basic Concepts*); Note,

741 F.2d 482, 495-96 (2d Cir. 1984) imposed a "mobster" harm limitation on private claims for relief under 18 U.S.C. § 1964(c). Its companion decision, *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 517 (2d Cir. 1984), imposed a "RICO injury" limitation on private claims for relief. *Haroco, Inc. v. American National Bank and Trust Co.*, 747 F.2d 384, 393-395 (7th Cir. 1984) rejected both articulations of the distinct injury limitation. Amici urge this Court to adopt the well-reasoned opinion of the Seventh Circuit on this issue.[9]

The text of 18 U.S.C. § 1964(c) as modified by the Second Circuit would read:

> Any person injured in his business or property by reason of a violation of Section 1962 of this chapter

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Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982).

[9] *Haroco* followed, however, the ill-advised rule adopted by some courts under 18 U.S.C. § 1962(c) that precludes holding an "enterprise" criminally or civilly responsible under general theories of *respondeat superior* or agency for the conduct of a "person" "employed by or associated with" it. 747 F.2d at 399-403. *But see Civil Action* at 286-325. Faced with the unattractive prospect that a "guilty enterprise" might, therefore, escape criminal or civil sanctions, the court developed an alternative theory of responsibility under 18 U.S.C. § 1962(a). Unfortunately, that theory fails to reach an enterprise that is *not* run for profit (a union) or a pattern of racketeering activity that does *not* produce income (murder), where it *might* be appropriate under the *express* text of 18 U.S.C. § 1963(a) to order "dissolution or reorganization of any enterprise." Unless such an enterprise is made a defendant, it is difficult to see how it could be dissolved or reorganized. Accordingly, *United States v. Hartley*, 678 F.2d 961, 984-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) followed an approach that is more consistent with RICO's text and purpose. Eventually, this Court will have to resolve this split in the circuits.

> *of a mobster-type or distinct from any injury sustained from the commission of any racketeering activity* may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. (emphasis added to alternative new text).

Since the text of the statute governs, *Russello v. United States,* 104 S. Ct. 296, 299 (1983) (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981), it is sufficient to note that the "short answer [to the Second Circuit's position] is that Congress did not write the statute that way." *Id.* at 300 quoting *United States v. Naftalin,* 441 U.S. 768, 773-74 (1979)).[10]

The first effort to narrow RICO involved reading into it an "organized crime" limitation to circumscribe the class of defendants under the statute. *See, e.g., Barr v. WUI/TAS,*

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[10] Congress passed the Sherman Act in 1890, yet it was not until recent times that the private enforcement mechanism of the antitrust statutes came into its own. The thrust of scholarly analysis of the Act's history places that disuse at the door of "judicial hostility." Sullivan, *Breaking up the Treble Play: Attacks on the Private Treble Damage Antitrust Action,* 14 Seton Hall L. Rev., 17, 19 (1983). Advances occurred after the New Deal, but the private enforcement mechanism came into its own only after key decisions of this Court in the 1950's. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores,* 359 U.S. 207, 211 (1959). Running parallel with the deep judicial hositility reflected in the adoption of the distinct injury limitation are the special pleading rules unjustifiably imposed on RICO litigants. *See Haroco,* 747 F.2d at 403-05 (rules rejected). A similar, but unsuccessful effort was made to so treat antitrust litigants, despite the liberalization of the Federal Rules in 1938. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1221 at 149 (1969). *See, e.g., Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). The developing historical parallels between the enforcement of the antitrust laws and RICO are disturbing. *But see* G. Hegel, *Philosophy of History* 6 (rev. ed. 1900) ("What experience and history teach us is this — that people and governments have never learned anything from history.").

Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975). Because that limitation had no support in the text of the statute, and because it had been specifically rejected in the legislative debates, the Second, Fifth, Seventh, and Eighth Circuits quickly rejected it. *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160, 1167 (5th Cir. 1984) (cases cited and followed). The other efforts have, in fact, been little more than surreptitious attempts to bring the organized crime limitation in the back door after the front door was slammed shut. *Schacht v. Brown,* 711 F.2d 1343, 1356 (7th Cir.) ("revived under . . . [a new] guise"), *cert. denied,* 104 S. Ct. 508 (1983).

Another effort involved reading a "competitive injury" limitation into civil RICO to circumscribe the class of injuries for which victims could obtain relief under the statute. *See, e.g., North Barrington Development, Inc. v. Fanslow,* 547 F. Supp. 207, 211 (N.D. Ill. 1980). The Seventh and Eighth Circuits rejected this effort. *Schacht v. Brown,* 711 F.2d at 1356-58; *Bennett v. Berg,* 685 F.2d 1053, 1058-59 (1982), *aff'd en banc,* 710 F.2d 1361 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 527 (1983).

The only effort gaining more than minimal acceptance in the lower courts has been the attempt to read a "racketeering enterprise injury" limitation into the statute. This limitation, like the competitive injury limitation, would circumscribe the class of injuries for which victims could obtain relief under the statute. The limitation first appeared in *Landmark Savings and Loan v. Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). Largely because the racketeering enterprise injury limitation lacked textual support, courts soon interpreted the "by reason of" language of Section 1964 as requiring a distinct injury. *See, e.g., Harper v. New Japan Securities International, Inc.,* 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("the most meaningful limitation"). Each of these efforts attempts to narrow the scope

of civil RICO by requiring that a plaintiff show "something more" than the injury suffered from the racketeering acts. *Willamette Savings & Loan v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1428 (D. Ore. 1984).

Courts offer a number of arguments to justify this rewriting of RICO. It is suggested, for example, that this reading of RICO is warranted by its similarity to Section 4 of the Clayton Act (15 U.S.C. § 4 (1982)). *See, e.g., Landmark Savings & Loan v. Rhoades,* 527 F. Supp. at 208. *But see Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 110 (1958) ("a determination under one statute [should not] be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes.") Like other courts, *Landmark* relied on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *Brunswick,* however, held that the plaintiff's injury must have *a* relationship to the Section 4 violation; it did not hold that the injury had to be *distinct*. In fact, the distinct injury limitation bears a closer resemblance to the public injury limitation that this Court rejected under the antitrust statutes, holding that imposing such a limitation was a decision for the Congress, not the judiciary. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). "By reason of" in Section 4, of course, requires actual, not distinct, injury. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-63 (1981). "By reason of" merely means "proximate cause." *Commerce Tankers Corp. v. National Maritime Union of America,* 553 F.2d 793, 800-01 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977).

To the degree that this Court's decisions with regard to standing under the antitrust laws have any relevance in analyzing RICO, it is *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 531 n.31, 545-46 (1983) that ought to be examined. In *Associated General Contractors,* this Court noted the

basic factors to consider in determining who had standing to bring an antitrust claim for particular kinds of injury. *See also Blue Shield of Virginia v. McCready,* 457 U.S. 465, 472 (1982). Neither *Sedima's* nor *Bankers Trust's* approach is consistent with the teaching of *Associated General Contractors*. Their holdings should be rejected.

Associated General Contractors makes another crucial point by suggesting that the language of Section 4 of the Clayton Act might not be "as broad as its words suggest" because "Congress [did not] intend[] such an open-ended meaning." 459 U.S. at 529-30. By contrast, Congress directed the courts to construe RICO liberally. 84 Stat. 947 (1970) ("The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes.").[11] Congress also specifically rejected in its debates the very standing jurisprudence that courts had developed under the antitrust statutes and that the defendants in these cases wish to use to restrict RICO's plain meaning. *See Civil Action, supra* note 8, at 253-56 (statements of Sen. Hruska reviewed); 263

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[11] On the relation between the rule of lenity and RICO's liberal construction directive, *see Civil Action* at 245 n.25, 288 n.150. Contrary to the assumption of *Sedima,* 741 F.2d at 502-03, and Petitioners' argument, *Brief of Petitioners* at 22-24, the rule of lenity in criminal prosecutions is a rule of statutory construction, not a requirement of due process; Congress, therefore, may set the rule aside and mandate liberal construction in civil *and* criminal cases. *See Tarrant v. Ponte,* 751 F.2d 459, 466 (1st Cir. 1985). Reflecting their hostility toward private civil RICO claims, district courts are, however, improperly limiting the application of the liberal construction directive to criminal prosecutions. *See, e.g., Berg v. First American Bank Shares, Inc.*, 599 F. Supp. 500, 506 (D.D.C. 1984) ("The broad construction given RICO in criminal prosecutions is simply inconsistent with the narrower construction which must be applied in the context of a civil case."). This Court's decision in *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954), cited in *Brief of Petitioners* at 24, does not dictate strict construction in light of *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 374-75 (1973). *See Civil Action* at 266 n.88.

n.72 (statements of Sen. McClellan reviewed). Accordingly, analogizing to antitrust standing concepts for the purpose of rewriting RICO is inappropriate. *Schacht v. Brown,* 711 F.2d at 1357-58; *Bennett v. Berg,* 685 F.2d at 1058-59.

The criminal and civil sanctions of RICO have a purpose, moreover, that goes beyond the limited rationale of the antitrust statutes, "namely, 'to punish, deter, incapacitate, and . . . directly to remove a corrupting influence from the channels of commerce.' " *Russello,* 104 S. Ct. at 303 (quoting Sen. McClellan, 116 Cong. Rec. 18,955 (1970)). As this Court explained in *Turkette,* "[t]he aim [of RICO] is to divest the [perpetrators] of the fruits of [their] ill-gotten gains." 452 U.S. at 585.

The real trouble with the distinct injury limitation is, however, that it is not merely a traffic light; it is a roadblock. It does not merely distinguish between proper and improper parties in enforcing RICO civilly or between proper and improper kinds of injury; it *precludes* suit under RICO by anyone, even conceding that a RICO violation occurred, except when the injury is trivial.

Indeed, erecting a roadblock to private civil RICO litigation appears to be the not-too-well-hidden purpose of the distinct injury limitation, for district courts have expressed fear that taking RICO at its face value would result in unjustifiable new federal litigation, where state law offers adequate remedies. *See, e.g., In re Action Industries Tender Offer,* 572 F. Supp. 846, 850 (E.D. Va. 1983) (distinct injury required) ("Congress did not intend for RICO to be used by private plaintiffs to claim treble damages for ordinary violations of criminal and tort laws."). *See also McCarthy v. Pacific Loan, Inc.,* 600 F. Supp. 137, 139 (D. Hawaii 1984) (criminal conviction required) ("To limit the expanding scope of civil RICO and the flood of litigation to

which it has given rise, several courts have imposed pleading or standing requirements on civil RICO plaintiffs."). Such a concern is not, however, a proper ground for rewriting a Congressional statute. *Tower v. Glover,* 104 S. Ct. 2820, 2826 (1984) ("It is for Congress to determine whether . . . litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate."). Concern with crowded court dockets as a reason for narrowing RICO was also addressed and rejected in the debates that preceded RICO. *See Civil Action* at 275 n.116, 277 n.120. In fact, in the teeth of such objections, Congress enacted RICO precisely because "state and federal [law] was not adequate." *Turkette,* 452 U.S. at 586. It is hardly appropriate, therefore, for courts to resurrect now a rational that Congress previously laid to rest. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 105 S. Ct. 658, 665 (1985). Additionally, Congress was "well aware," *Turkette,* 452 U.S. at 586, that RICO's new remedies would overlap with existing law, for it specifically provided that RICO would not "supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided" in RICO itself. 84 Stat. 947 (1970). This provision has meaning only if overlap was foreseen. Finally, suggesting that a court read a statute narrowly because "no need" exists for the protection extended by its plain meaning is improper. *Rubin v. United States,* 449 U.S. 424, 431 n.8 (1981) (quoting *TVA v. Hill,* 437 U.S. 153, 194 (1978)) ("wisdom or unwisdom . . . is to be put aside in the process of interpreting a statute").

The distinct injury limitation suffers from yet another defect. Like the phrase "organized crime" or, for that matter, "garden variety fraud" and "business dispute," no one has offered a satisfactory *legal* definition of distinct injury. Courts have indicated that it is something more than injury resulting from the predicate acts. But it has "not

been made clear . . . what that 'something more' would be." *Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983).[12]

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[12] Petitioners in this appeal make an additional argument regarding distinct injury that has two aspects, neither of which is clearly separated. First, petitioners suggest that respondents did not allege that the enterprise's affairs were "direct[ed] or manag[ed] . . . through the overcharges of interest . . . ." *Brief of Petitioners* at 17. Apparently, they are here arguing that the pattern of racketeering may *only* be aimed at the enterprise itself and must be the means by which the enterprise is itself corruptly run (the legitimate enterprise as "victim"). Nothing in RICO, however, says that the pattern of racketeering cannot be aimed at another person or entity and still be the means by which an enterprise is corruptly run (the enterprise, legitimate *or* illegitimate, as "perpetrator"). *Civil Action* at 286-325. Second, they argue that respondents did not allege that the enterprise's affairs were "integrally permeated [at] the management" level by the pattern of racketeering. *Brief of Petitioners* at 27. *See also id.* at 17 ("integral relationship"), 18 (not "merely incidental," but "inseparable part of management"), 28 ("indispensable factor in . . . management"). Nothing in RICO, however, says that the pattern of racketeering has to be integral, not merely incidental, and an inseparable or indispensable part of the management of the enterprise. 18 U.S.C. § 1962(c) merely says "conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity." Properly so, the courts of appeals read that language in a common sense fashion, and they reject the sort of restrictive reading here urged by petitioners. *See, e.g., United States v. Cauble,* 706 F.2d 1322, 1331-33 (5th Cir. 1983) (cases collected and analyzed), *cert. denied,* 104 S. Ct. 996 (1984). Even accepting petitioners illiberal construction of "conduct" (they ignore "participate" and "directly or indirectly"), the facts alleged meet their own test. The business is banking, which obviously includes lending money at various rates of interest, and Heller is a parent of the subsidiary as Grayheck is its officer and director; if they set a fraudulent rate and implemented it in the bank's lending practices, it meets any test of RICO that respects its language, legislative history and purpose. *See, Comm'n v. Beneficial Finance Co.,* 360 Mass. 188, 241, 275 N.E.2d 33, 86 (1971) (Conduct of employee of subsidiary in "pattern" of bribery attributed to parent). These arguments also answer the similar contentions of the American Bankers Association. *Brief of Amicus Curiae* at 14-20. The Association's suggestion that the conduct of a RICO defendant must be "characteristic of organized crime," *id.* at 6-14, is fully answered by reasoning of this Court's opinions in *Perrin v. United States,* 444 U.S. 37, 46-49 (1979); *United States v. Culbert,* 435 U.S. 371, 373-80 (1978); and *United States v. Fabrizio,* 385 U.S. 263, 265-69 (1966).

To its credit, *Bankers Trust* attempted to illustrate a distinct injury caused by a pattern, but not caused by the act of racketeering. The majority observed:

> [A] plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. 741 F.2d at 517.

The court offered this illustration on the assumption that "the terms of § 1964(c) were not discussed at all in the Senate, whose final RICO bill did not contain a provision for a private right of action . . . ." 741 F.2d at 517. Unfortunately, the court's scholarship is defective. After RICO passed the House, the Senate, in fact, reconsidered it with the express private claim for relief included.[13]

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[13] Under this Court's prevailing jurisprudence in 1970, it is likely that when RICO passed the Senate it gave rise to an *implied* private claim for actual damages and equity relief. *See, e.g., J. I. Case Co. v. Borak,* 377 U.S. 426, 433 (1964) ("It is the duty of the Courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.") *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 378 (1982) ("at the time the legislation was enacted"); *Basic Concepts* at 1018 n.46; *Civil Action* at 262 n.71. The contrary assumptions of *Sedima, Bankers Trust* and petitioners, *Brief of Petitioners* at 19–20, simply cannot be squared with this Court's relevant jurisprudence. The issue of implied equitable relief is considered at length in Professor Johnson's able piece, *Predator Rights: Multiple Remedies for Wall Street Sharks Under the Securities Laws and RICO,* 10 J. Corp. L. 3, 62-75 (1984), which correctly concludes, contrary to *Sedima,* that RICO includes equitable relief for private parties, either expressly or by implication. *See also* Note, *The Availability of Equitable Relief in Civil Causes of Action In RICO,* 59 Notre Dame L. Rev. 945 (1984).

At that time, Senator Dole urged the adoption of the House bill, which then contained the treble damage provisions; he illustrated the importance of civil RICO by describing a pattern of arson visited by an organized crime figure on the A & P Tea Co. in an effort to sell it detergent. Senator Dole stated the statute would impose "heavy" economic sanctions on such conduct, and it would serve as an "effective" deterrent. 116 Cong. Rec. 36,296 (1970).

In his remarks concerning RICO, Senator Dole said nothing about *limiting* private civil suits by requiring prior criminal convictions. Indeed, he expressly recognized the inadequacy of proceeding solely through the criminal process. Similarly, Senator Dole said nothing about *limiting* the A & P's private civil recovery of treble damages for its loss of business and its fire-bombed stores to *distinct* injuries. Indeed, Senator Dole would not have described such circumscribed civil sanctions as either "heavy" or an "effective" deterrent, much less "enhanced," as the findings and statement of purpose described them. 84 Stat. 923 (1970).

Finally, with regard to *Sedima's* review of RICO's legislative history, this Court must set straight *Sedima's* twisted view that while RICO "for the most part originated in the Senate," the civil provisions permitting suit by private persons "originated in the House." 741 F.2d at 488.[14]

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[14] *Sedima's* view of this portion of RICO's legislative history has begun to mislead other courts, including *Haroco*, 747 F.2d at 398. (*Sedima*'s analysis of the legislative history of RICO termed "persuasive"). *See also McCarthy v. Pacific Loan Inc.*, 600 F. Supp. 137, 139-40 (D. Hawaii 1984); *White v. Fosco*, 599 F. Supp. 710, 715-16 (D.D.C. 1984); *Gardner v. Surnamer*, 599 F. Supp. 477, 479-80 (E.D. Pa. 1984). *But see*, Note, *Civil RICO: Prior Conviction and Burden of Proof*, 60 Notre Dame L. Rev.__(1985).

A review of the legislative history of the 1970 Act demonstrates the misconceived character of *Sedima's* view. First, Congress acted deliberately in its enactment of the Organized Crime Control Act, including civil RICO, and it had impressive advice during the process. Congressional investigations, presidential commissions, and bar associations played major roles. The process originated in the hearings and reports of the Kefauver Committee, whose focus included infiltration by organized criminal elements into legitimate businesses. *Basic Concepts, supra* note 8, at 1014-15; *Civil Action* at 249. The American Bar Association ("ABA") formed its Organized Crime Commission and participated actively, recommending model legislation, which included immunity, perjury, and syndicated gambling provisions.[15] In 1967, the President's Commission on Law Enforcement and Administration of Justice made the key recommendation that led to RICO when it urged that Congress adopt antitrust type remedies to control underworld activities, particularly in legitimate businesses.[16] In response, Senator Hruska and Congressman (now Justice) Poff introduced companion legislation that included criminal and civil sanctions and public and private enforcement mechanisms in *both* Houses of the Congress. *See, e.g.*, S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17,999 (1967). The ABA carefully studied the bills and *endorsed* their concepts, but recommended that the Congress draft them outside of the antitrust statutes to give them a *broader* impact.

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[15] *See, e.g.*, 2 *Organized Crime and Law Enforcement* 57-91 (syndicated gambling) and 157-86 (immunity) (1953) (Final Report By and Model Acts Prepared for the ABA Commission on Organized Crime); *Organized Crime Control: Hearings Before Subcomm. No. 5, House Comm. on Judiciary*, 91st Cong., 2d Sess. 579-85 (1970) (perjury) (hereinafter House Hearings).

[16] *The Challenge of Crime in a Free Society: Final Report of the President's Commission on Law Enforcement and Administration of Justice* 208 (1967) ("techniques . . . especially valuable because they require a less rigid standard of proof").

The ABA presented these recommendations to the House *and* the Senate in 1969.[17] Additionally, the National Commision on Reform of the Federal Criminal Law undertook similar studies.[18] The Commission included Congressman Poff, its vice-chairman, and Senators McClellan and Hruska, as well as Congressman (now Judge) Mikva. Subsequently, Senator Hruska and Congressman Poff drafted new legislation that took the ABA at its word. They introduced this legislation in both Houses.[19] The Senate held hearings at which the ABA orally presented its favorable views.[20] The President also endorsed the legislation *while it was being processed in the Senate* and specifically called for antitrust-type remedies in his "Message on Organized Crime." *Senate Hearings* at 449 ("The injunction with its power of contempt and seizure, monetary fines and treble damages actions . . . suggest a new panoply of weapons . . . .").

As a result of the hearings, Senators McClellan and Hruska, after consultation with Congressman Poff, introduced S. 1861. 115 Cong. Rec. 9,566-68 (1969). While S. 1861 did not include an express private claim for relief, it is erroneous to conclude, as *Sedima* does, that S. 1861 did not give rise to an implied claim for actual damages and equity relief, or to argue that the sponsors of the legislation had rejected the concept of the private attorney general. Not one word in the remarks introducing the legislation

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[17] *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws and Procedures, Senate Comm. on Judiciary,* 91st Cong., 1st Sess. 259 (statement), 556 (report) (1969) (hereinafter *Senate Hearings); House Hearings* at 537 (statement), 147 (report). *See Basic Concepts* at 1015; *Civil Action* at 254-56.

[18] *Civil Action* at 253 n.47 and accompanying text.

[19] *See, e.g.,* S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6,995-96 (1969).

[20] *Senate Hearings* at 259 (testimony of Rufus King for the ABA).

supports this proposition.[21] The bill itself said in its Statement of Findings and Policy that it included "other relief." 115 Cong. Rec. 9,568 (1969). The legislation was termed "remedial" and its "liberal construction" was mandated. *Id.* at 9,571. Accordingly, it should be concluded that the Organized Crime Control Act, as amended in Title IX to include the text of S. 1861, and as passed by the Senate, gave rise to an implied private claim for relief. *Cannon v. University of Chicago,* 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law.") Not one word of legislative history can be cited to establish that Senators McClellan or Hruska — or any other senators — spoke *against* such a private claim for relief. *Sedima* cites none. The Organized Crime Control Act then passed the Senate by a vote of 73 to 1. 116 Cong. Rec. 972 (1970).

While the legislation was pending in the House, the President asked the ABA to study it. The ABA's views were presented to the House Committee in oral testimony by its president-elect, Edward L. Wright. He called for the House to restore to the bill the treble damage provision that had appeared in S. 1623. *House Hearings,* at 543-44. The Committee was well aware of the scope of the bill as passed by the Senate, since the Association of the Bar of the City of New York had objected in testimony before the House Judiciary Committee to its reach beyond "organized crime," including its application to "any securities fraud case." *House Hearings,* at 294 ("sweep far beyond the field of organized crime"); 329 ("any securities fraud case"); *see also*

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[21] When Senator McClellan introduced S. 1861, for example, he said he did not want to see the "great complexity of antitrust law enforcement" introduced into the construction of RICO. 115 Cong. Rec. 9,567 (1969). That "complexity" is, of course, the jurisprudence on standing, which is applicable to private, not public enforcement. *See supra,* note 13 for a review of the implied claim for relief jurisprudence then prevalent.

Civil Action at 272-73. Moreover, Senator McClellan took the floor and called to the *Senate's* attention the ABA's recommendations; he explicitly characterized its recommendation for the restoration of the treble damage provision as a "constructive contribution." 116 Cong. Rec. 25,190 (1970).

The House Committee reported the Organized Crime Control Act in the enacted language. H. R. Rep. No. 1549, 91st Cong., 2d Sess. 56-58 (1970). Dissenting committee members, including Congressman Mikva, specifically objected to the private civil provisions' breadth, because the provisions were not limited to "organized crime." The dissenting members noted that the provisions were "a tool to be employed for all." *Id.* at 187. They also stressed the burden that this breadth might place on the courts. *Id.*

During the vigorous House debate, Congressman Steiger offered a comprehensive amendment that included seven different provisions (not a single subject matter amendment relating only to equity relief as *Sedima* implies, 741 F.2d at 489 n.20).[22] Congressman Poff suggested that Steiger *withdraw* his amendment — the amendment was *not defeated* — and Congressman Steiger quickly agreed. 116 Cong. Rec. at 35,346-47 (1970). Even had the amendment been considered and been defeated, it would not have affected the statute's plain language.[23] Accordingly, the

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[22] The Steiger amendment contained provisions that would have provided that no amount in controversy was required, clarified the availability of equity relief, included a claim for relief for damages for the government, repeated the private claim for treble damage relief, authorized the attorney general to intervene in private litigation, provided for non-mutual estoppel between government criminal and private civil cases, and imposed a uniform federal statute of limitations on RICO suits. 116 Cong. Rec. 35,346 (1970).

[23] *Bryant v. Yellen*, 447 U.S. 352, 376 (1980) ("failure to enact suggested amendments . . . [is] not the most reliable indication[] of congressional intention").

Poff-Steiger interchange is hardly, as *Sedima* suggests, 741 F.2d at 489 n.20, an *inclusion* of treble damage relief and an *exclusion* of equitable relief. The legislation then passed the House by a vote of 341 to 26. 116 Cong. Rec. 35,363 (1970). After the Senate reconsidered it, the President signed the Bill, as expected in light of his earlier endorsement of its basic concepts.[24]

II. COURTS ARE WITHOUT POWER TO REDRAFT LEGISLATION BECAUSE OF A DISAGREEMENT WITH ITS POLICY OR A REASSESSMENT OF ITS POSSIBLE EFFECT ON THE ADMINISTRATION OF JUSTICE.

Article III of the Constitution does not grant a court power to redraft legislation because of its "appraisal of the wisdom or unwisdom of a particular [legislative] course

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[24] The issues raised by Congressman Steiger's proposed amendment led RICO's Senate sponsors to introduce amendatory legislation in the 92d and 93d Congresses. The legislation, like Congressman Steiger's amendment, made a number of broadening or clarifying changes in RICO; the legislation passed in the Senate, but it was not processed in the House. *Basic Concepts* at 1020 n.67; *Civil Action* at 278 n.121. *Sedima* suggests that these proposed amendments shed light on the action of the 91st Congress, 741 F.2d at 489 n.20. They will not carry the weight *Sedima* places on them. *Russello*, 104 S. Ct. at 302; *United States v. Wise*, 370 U.S. 405, 411 (1962) ("[s]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage"). *Sedima* also notes the testimony of the Department of Justice at that time that only it could obtain "injunctive" relief. *Victims of Crime: Hearing Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 158 (1972). *Sedima* does *not* note that the Department also indicated its view that a criminal conviction was *not* required, *id.*; nor does it note that the ABA endorsed the legislation, commenting that it was but a "codification" of basic antitrust law, *id.* at 490. *None* of this subsequent hearing testimony can be persuasively used to interpret the 1970 Act. *Garcia v. United States*, 105 S. Ct. 479, 483-84 (1984) (reliance on legislative history beyond committee reports eschewed); *Piper v. Chris-Craft Industries*, 430 U.S. 1, 31 (1977) ("statements received [in hearings] without comment . . . [or] cross examination . . . [are of] limited value.").

. . . ." *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)). *See also Park 'N Fly, Inc.*, 105 S. Ct. at 666 (1985); *Turkette*, 452 U.S. at 587.

Nevertheless, an examination of the policy considerations implicated by Congress' chosen course of action in 1970 is required by this Court's jurisprudence indicating that plain meaning may be departed from to avoid absurd or surprising results. *See, e.g., United States v. Ryan*, 284 U.S. 167, 175-76 (1931) (civil forfeiture provision narrowed to give it "a sensible construction"). The language chosen by Congress will then be seen as "neither absurd nor surprising." *Turkette*, 452 U.S. at 587.

The current controversy over RICO has not centered on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of unions and governmental entities. Instead, the controversy has focused almost exclusively on the commercial fraud area.[25] In 1974, the Chamber of Commerce of the United States published a comprehensive study

[25] Legitimate business people have little to fear from federal or state RICO legislation in the fraud area. Neither penalizes conduct that is not presently subject to criminal sanctions under its predicate offenses. Both merely provide enhanced criminal and civil sanctions and new enforcement mechanisms. Legitimate business people do not perpetrate fraud; they are victimized by it.

In *Arizona ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 597, 667 P.2d 1304, 1312 (1983), a civil securities fraud action, the Court observed:

> There is a moral imperative to provide redress for those injured. Further, when out-of-state investors are swindled by Arizona enterprises, the reputations and businesses of the majority of honest business people within the state are harmed. That this state is willing to provide aid in redressing these wrongs is evidence that the state is serious in its fight to eradicate organized crime. This evidence may instill confidence in non-residents seeking to invest in the legitimate businesses of this state.

It is interesting to note that Walter E. Heller Western, Inc., subsidiary of Petitioner Walter E. Heller International Corp., has itself sought and received a judgment in the amount of $1,875,000 pursuant to the Arizona racketeering act as the victim of a corporate officer's embezzlement prosecuted by the Arizona Attorney General. Neither the criminal case, Maricopa County Superior Court No. CR-134094, nor the parallel private civil action filed by victim Walter E. Heller Western, Inc., Maricopa County Superior Court No. C-448286, alleged any distinct injury or any special injury at all beyond that of the predicate offenses. Petitioner's subsidiary simply alleged a Fraudulent Scheme and Artifice, A.R.S. § 13-2310 (derived from the federal mail fraud statute 18 U.S.C.A. § 1341) and sought treble damages, costs and attorneys' fees pursuant to Arizona's racketeering statute. The position of Petitioner as victim or as defendant seems to determine its position on the policy issues presented.

Good faith commercial disputes do not constitute *criminal* fraud; the elements of criminal fraud must be shown even in a RICO *civil* suit, as Judge Ackerman persuasively demonstrates in *United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279, 332 n.30, 337 (D.N.J. 1984), *appeal pending*. RICO does not, therefore, involve strict liability, negligence, or constructive fraud. *Civil Action* at 244 n.23, 306 n.172, 334 n.216. RICO, through its predicate offenses, requires *criminal* state of mind. *See, e.g., Durland v. United States*, 161 U.S. 306, 314 (1896) (good faith defense to mail fraud). *See also Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 624-26 (1985) (good faith reliance on advice of counsel defense to claim for multiple damages for "willful" conduct); Hawes and Sherrard, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1 (1976). RICO's opponents, in fact, object to the *effective* enforcement of *present* law. *See also Haroco*, 747 F.2d at 399 n.16 (criminal fraud under RICO must be distinguished from civil fraud).

An impression is also apparently widespread in the securities industry that RICO "overlaps" all securities fraud. Nothing could be further from the truth. RICO says "offenses" involving "fraud in the sale of securities" "punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means a breach of the *criminal* laws. *Black's Law Dictionary* 975 (5th ed. 1979); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) ("Criminal intent is . . . necessary to either mail fraud or securities fraud [under RICO]"). Accordingly, only the securities acts' *criminal* fraud provisions fall within RICO. *See, e.g.*, Securities Act of 1933 § 24, 15 U.S.C. § 77x (1982) ("willfully"); Securities Exchange Act of 1934 § 32, 15 U.S.C. § 78ff ("willfully"). Merely negligent conduct does not fall within RICO. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980) (intent to defraud rather than negligence in violations of

of fraud. The Chamber estimated the direct economic cost

of various forms of fraud at $41.78 billion annually.[26] Given the inflation rate since 1974, a figure twice that amount could be conservatively estimated today.[27]

Fraud against the government, not included in the Chamber's study but relevant in light of *Sedima's* fact pattern, costs anywhere from $2.5 to 25 billion.[28] Since much of the money included in federal grant programs passes through state and local government's hands, such units of government could bring civil RICO suits to vindicate their interests against fraud. *See, e.g., Comm'n v. Cianfrani,* 600 F. Supp. 1364, 1368-69 (E.D.Pa. 1985) (RICO treble damage award entered against state senator for "ghost" workers); *Anchorage v. Hatachi Cable, Ltd.,* 547 F. Supp. 633, 644 (D. Alaska 1982) (RICO civil suits in kickback scheme). This case may also vitally affect the interpretation of state racketeering acts, which provide an important separate state

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§ 17(a)(1) of the 1933 Act, § 10(b) of the 1934 Act, but not when engaging in untrue statements or omissions or transactions that operate as a fraud under § 17(a)(2) and § 17(a)(3) of the 1933 Act). Some overlap between statutes "is neither unusual nor unfortunate." *SEC v. National Securities, Inc.,* 393 U.S. 453, 468 (1969). Indeed, the securities acts envision it. *See, e.g.,* Section 28(a) of the Securities and Exchange Act of 1934 § 28, 15 U.S.C. § 78bb(a) ("rights and remedies" "in addition" to "any and all other rights" that might exist).

[26] United States Chamber of Commerce, *White Collar Crime: Everyone's Problem, Everyone's Loss* 6 (1974).

[27] *See Hearings on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1981: Hearings Before the Subcomm. on the Departments of State, Justice and Commerce, the Judiciary, and Related Agencies of the House Comm. on Appropriations,* 96th Cong., 2d Sess. 17 (1980) (testimony of William H. Webster) ($44 to 100 billion).

[28] N.Y. Times, May 17, 1982, at 15, col. 2. *Sedima* misleadingly described the case as involving "business fraud." 741 F.2d at 484. Government contract procurement fraud more accurately describes the conduct, since NATO subcontractors were involved.

cause of action for defrauded state and local governments, whether or not the funds originated in federal programs. The data on specialized government benefit programs are equally disturbing. Medicaid beneficiary fraud amounts to $1.2 billion; medicaid provider fraud amounts to $715 million.[29] Medicare fraud amounts to $1.5 billion.[30]

Bank fraud is deeply disturbing, especially in situations similar to that in *Bankers Trust.* In 1980-81, 105 banks and savings and loan associations failed, costing the taxpayers $1 billion. Criminal activity was a "major contributing factor" in roughly one-half of the bank failures and in one-quarter of the savings and loan failures.[31] Subsequent failures are estimated to have added another $1 billion to the total.[32] In short, fraud is no "garden variety"

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[29] *Unreported Taxable Income From Selected Illegal Activities* (Report by Abt Associates to Internal Revenue Service) 294 (Sept. 1984).

[30] *Id.* at 303.

[31] *House Comm. on Government Operations, Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions,* H.R. Rep. No. 1137, 98th Cong. 2d Sess. 5 (1984) (hereinafter *Bank Report*). The Report further notes:

> Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are criminally prosecuted usually serve little, if any, time in prison for thefts that often cost millions of dollars.

The parties below did not raise the possible implications of this Court's jurisprudence in *Marine Bank v. Weaver,* 455 U.S. 551, 558-59 (1982); *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 569-70 (1979); or *Silver v. New York Stock Exchange,* 373 U.S. 341, 357-61 (1963) on individuals or entities in transactions that are subject to other comprehensive and pervasive schemes of federal regulation. *But see* 15 U.S.C. § 78bb(a); 29 U.S.C. § 1144(a); 84 Stat. 947 (1970); and note 35 *infra.* It may be appropriate for this Court expressly to leave these implications open.

[32] *Bank Report* at 5. *See generally* H. Edelhertz, *The Nature, Impact*

matter to the people or the businesses of this nation. Legal remedies must be developed that are, in an appropriate combination, swift, sure, and severe. R. Posner, *Economic Analysis of Law* § 7.2 (2d ed. 1977). Civil RICO provides those remedies; its application to fraud, therefore, is neither absurb nor surprising. *See also* 84 Stat. 922-23 (1970) (Statement of Findings and Purpose) ("fraud . . . harms innocent investors") *Alcorn County,* 731 F.2d at 1165 ("[T]he provision for treble damages [was intended by Congress] . . . to encourage private enforcement of the law on which RICO is predicated. These provisions provide strong incentives to civil litigants and are integral to the efforts of Congress to enlist the aid of civil claimants in deterring racketeering . . . .").

Civil RICO promises great benefits. Yet its possible detrimental use must be frankly faced. Commentators express concern that civil RICO has inspired frivolous law suits.[33] Fear is also expressed that an "explosion" of RICO

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and Prosecution of White-Collar Crime 6-7 (1970) ("white-collar crime, like common crime, can have a serious influence on the social fabric . . . ."); *Civil Action* at 341-49 (various studies on fraud and government actions to combat it reviewed). Raising federalism concerns, too, is inapt in the context of *Bankers Trust,* as it involved bankruptcy fraud, a matter entrusted to the federal government by the Constitution. U.S. Const., art. III, § 7.

[33] Those who express this concern have the burden of proving:

1) that a *substantial* number of frivolous RICO suits are being filed,
2) that *existing* safeguards against such suits are not adequate to remedy them,
3) that *new* safeguards against such suits that are adequate *cannot* be designed, and
4) that the detriment from these suits *outweighs* the benefit from legitimate suits.

None of these burdens has been met. Nor is it a concern that warrants the rewriting of a congressional statute. *Patsy v. Fla. Bd. of Regents,* 457 U.S. 496, 512 n.13 (1982) (burden on federal courts "not sufficient to justify a judicial decision to alter [a] congressionally [drafted scheme]").

suits is occuring that threatens to overload the federal courts.[34] These fears have been unduly inflamed, for ample remedies now exist to deal with such suits.[35] Accordingly, no policy considerations exist that warrant this Court's imposition of special limitations on civil RICO. *Blue Chip*

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[34] *See Brief of Amici* in *Sedima, S.P.R.L. v. Imrex Co. Inc.,* No. 84-648 at 22 n.31 for data on the actual workload of federal courts that places this concern in its proper context.

Sedima, 741 F.2d at 487 suggested that suits under civil RICO *against* "respected and legitimate 'enterprises'" are "extraordinary, if not outrageous." *But see Haroco,* 747 F.2d at 395 n.14. ("[T]he white collar crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . . ."). Those who make such remarks are apparently unaware of the substantial body of literature on white-collar crime by so-called respectable businesses. *See, e.g.,* Saxon, *White Collar Crime: The Problem and The Federal Response,* Rep. No. 80-84 EPW Congressional Research Service, (1980) (literature reviewed); Ross, *How Lawless Are Big Companies,* Fortune, Dec. 1, 1980, at 57 (survey of 1043 major corporations indicated that between 1970-1980, 117 had significant convictions or consent decrees consisting of 98 antitrust violations; 28 cases of kickbacks, bribery, or illegal rebates; 21 instances of illegal political contributions; 11 cases of fraud; and 5 cases of tax evasion).

[35] *See Reiter v. Sonotone Corp.,* 442 U.S. 330, 344-45 (1979) (fear of frivolous suits unjustified in light of the tools available); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52 (1938) (Brandeis, J.) ("Law suits . . . often prove to . . . [be] groundless; but no way has been discovered for relieving a defendant from the necessity of a trial to establish the fact.") Consider *Report of the Proceedings of the Judicial Conference of the United States, September 21-22, 1983* 56 ("[t]he existing tools [to weed out frivolous or meritless litigation] are sufficient, but perhaps not fully understood or utilized."). If the remedies are inadequate, however, it is the remedies, not the substantive law that should be changed. *Hudson v. Palmer,* 104 S. Ct. 3194, 3215 n.30 (1984) (Stevens, J., dissenting); *Hoover v. Ronwin,* 104 S. Ct. 1989, 2012 (1984) (Stevens, J. dissenting). Congress, too, sits to make just such decisions. 130 Cong. Rec. S13,349 (daily ed. Oct. 5, 1984) (statement of Sen. Thurmond announcing hearing on civil RICO). *See Patsy, supra,* note 33, 457 U.S. at 513 (1982) ("The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.").

Stamps v. Manor Drug Store, 421 U.S. 723, 748 (1975) ("[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.").

CONCLUSION

This Court should reject the judicial effort to read into civil RICO a distinct injury limitation.[36]

Respectfully Submitted,

Robert K. Corbin
Attorney General of Arizona

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[36] This amici's brief in *Sedima* concluded with a quote from Congressman Steiger, in which he expressed his concern that sophisticated arguments on behalf of organized crime had abrogated the law. Congressman Steiger's insights are unfortunately neither original nor applicable only to organized crime. More than 100 years ago, this Court noted, "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . [By such] a construction [it is possible to] annul [it] and render[] it superfluous and useless." *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.) *See also Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (Tort Claims Act) (rejecting "distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation"). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such construction (1) "tend[ed] to bring the law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." 3 *Jurisprudence* 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490.

Appendix A

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE (18 U.S.C. 1961-1968)

As amended, October 25, 1984

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States

Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred

in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an

unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly and indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure

to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury,

harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within

thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the

right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as

he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such

attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for

the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any succes or so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office and with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such

custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

1. *Ariz. Rev. Stat. Ann.* § 13-2312 (1978 & Supp. 1984).
2. *Cal. Penal Code* § 186 (West Supp. 1984).
3. *Colo. Rev. Stat.* § 18-17-101 (Supp. 1983).
4. *Conn. Gen. Stat. Ann.* § 53-394 (Supp. 1984).
5. *Fla. Stat. Ann.* § 895.01 (West Supp. 1983).
6. *Ga. Code Ann.* § 16-14-1 (Supp. 1982).
7. *Hawaii Rev. Stat.* § 842-1 (1976).
8. *Idaho Code* § 18-7801 (Supp. 1983).
9. *Ill. Rev. Stat. Ch.* 56-1/2 § 1651 (Smith-Hurd Supp. 1983) (limited to narcotics).
10. *Ind. Code Ann.* § 35-45-6-1 (Burns Supp. 1982).
11. *La. Rev. Stat.* §§ 15:1351-56 (West. 1983) (limited to narcotics).
12. Mississippi, S. Bill No. 1087, enacted 1984.
13. *Nev. Rev. Stat.* § 207.4-207.17 (1983).
14. *N.J. Stat. Ann.* 2C:41 (Supp. 1983).
15. *N.M. Stat. Ann.* § 30-42-1 (Supp. 1980).
16. *N.D. Cent. Code* Ch. 12.1-06.1 (Supp. 1983).
17. *Or. Rev. Stat.* § 166.715 (1981).
18. 18 *Pa. Cons. Stat.* § 911 (1983).
19. *R.I. Gen. Laws* § 7-15-1 (Supp. 1983).
20. *Wash. Rev. Code Ann.* § 9A.04.080 (Supp. 1984).
21. *Wis. Stat. Ann.* § 946.80 (West Supp. 1983).
22. *Utah Code Ann.* § 76-10-1601 (Supp. 1983).

STATE RICO SURVEY

	Federal	Hawaii	Pennsylvania	Florida	Arizona
ENACTED	Oct. 15, 1970	1972	June 6, 1973 June 27, 1978	Oct. 1, 1977 June 23, 1979	Oct. 1, 1978 1980, 1981
AMENDED	Oct. 1, 1979		Dec. 4, 1980		1982, 1983, 1984
CRIMINAL ACTION					
1. Proceeding allowed	Yes 18 § 1961	Yes § 842	Yes 18 § 911	Yes § 895	Yes § 13-2301
2. Brought by					
AG	NP	NP	Yes 911e(2)	NP	NP
DA	NP	NP	Yes 911e(2)	NP	NP
3. Court	NP	NP	NP	NP	NP
ACTS					
4. Prohibited Activities					
– investment of $ from pattern or debt	Yes 1962(a)	Yes 842-2(1)	Yes 911b(1)	Yes 895.03(1)	Yes 2312A
– investment or control through pattern or debt	Yes 1962(b)	Yes 842-2(2)	Yes 911b(2)	Yes 895.03(2)	Yes 2312A
– participation through pattern or debt	Yes 1962(c)	Yes 842-2(3)	Yes 911b(3)	Yes 895.03(3)	Yes 2312B
– conspiracy to do the above	Yes 1962(d)	NP	Yes 911b(4)	Yes 895.03(4)	NP
5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excluding imprisonment 1961(5)	NP	2 rel., 1 after eff. date 911h(4)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 895.02(4)	None required
6. Predicate offenses	Yes 1961(1)	Yes 842-1	Yes 911h(1)	Yes 895.02(1)	Yes 2301D(4)
7. Person	Yes 1961(3)	Yes 842-1	Yes 911h(2)	NP	NP
8. Enterprise	Yes 1961(4)	Yes 842-1	Yes 911h(3)	Yes 895.02(3)	Yes 2301D(2)
9. State of mind	NP	NP	NP	NP	Knowing 2312C
SANCTIONS					
10. Sanctions					
– imprisonment	Up to 20 yrs. 1963(a)	Yes 842-3	Felony 1* 911c	Yes 895.04(1)	Class 3 fel. 2312C
– fine	Up to $25,000 1963(a)	Yes 842-3	Felony 1* 911c	Yes, up to 3x gain or harm 895.04(2)	Class 3 fel. 2312C
– forfeiture	Yes 1963(a)	Yes 842-3	NP	NP	Yes 2313, 2314
– costs	NP	NP	NP	Yes 895.04(2)	Yes 2313, 2314
11. Injunctive relief					
– restraining order	Yes 1963(b)	NP	NP	NP	Yes 2313
– racketeering lien	NP	NP	NP	Yes 895.07	Yes 2313, 2314.02
CIVIL SUIT					
12. Proceeding allowed	Yes 1964	Yes 842-5, 3	Yes 911d	Yes 895.05	Yes 2314
13. Brought by					
– AG	Yes 1964(b)	Yes 842-5	Yes 911e(1)	Yes 895.05(5)	Yes 2314A
– DA	NP	NP	NP	Yes 895.05(5)	Yes 2314 A, K
– Private Party	Yes 1964(c)	Yes 842-3(c)	NP	Yes 895.05(6)	Yes 2314A
14. Court	U.S. Dist. 1964(a)	Circuit 842-5	Courts of Common Pleas, Commonwealth Ct. 911d(1)	Circuit 895.05(1)	Superior 2314
15. Burden of Proof					
– Law	NP	NP	NP	NP	Preponderance 2314I
– Equity	NP	NP	NP	NP	Preponderance 2314I
16. Provision for innocent parties	Yes § 1964(a)	Yes 842-8(a)	Yes 911d1ii	Yes 895.05(2)(c)	Yes 2314B

17. Preliminary relief	Yes 1964(b)	Yes 842-6	Yes 911d2	Yes 895.05(5)(6)	Yes 2314C
– harm requirement	NP	NP	NP	Yes 895.05(6)	NP
– bond is an option	Yes 1964(b)	Yes 842-8(b)	Yes 911d2	Yes 895.05(5)(6)	Yes 2314C
18. Showing for relief					
– general	NP	NP	NP	Yes 895.05(6)	NP
– no special	NP	NP	NP	Yes 895.05(6)	NP
19. Scope of equitable relief					
– divest	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(a)	Yes 2314D(1)
– restrict	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(b)	Yes 2314D(2)
– dissolve	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(ii)	Yes 895.05(1)(c)	Yes 2314D(3)
– reorganize	Yes 1964(a)	Yes 842-8(a)	NP	Yes 895.05(1)(c)	Yes 2314D(3)
– revoke permits	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(d)	NP
– forfeit charter	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(e)	NP
20. Scope of legal relief					
– amount	3x 1964(c)	Damages 842-8(c)	NP	3x + punitive 895.05(7)	3x 2314A
– costs	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
– attorney fees	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
PROPERTY SUBJECT					
21. Type of property subject to forfeiture					
– real property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(a), (b)
– personal property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
– money	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
– may substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY					
22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 1968	Yes 842-10	Yes 911f	Yes 895.06	Yes 2315
23. Seizure without process in certain instances	NP	NP	NP	Yes 895.05(3)	NP
24. Relation back	NP	NP	NP	Yes 895.05(2)b	2314.02I(1), (2)
25. Jury trial	NP	NP	NP	Yes 895.05(7)a	NP
26. Estoppel	Yes 1964(d)	Yes as to action by the State 842-8(d)	Yes 911d(3)	Yes 895.05(8)	Yes 2314F
27. Intervention by State	NP	NP	NP	Yes 895.05(9)	Yes, but not in action by D.A. 2314K
28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 895.05(11)	Yes 2314M
29. Priority of individual over State to compensation	NP	NP	NP	Yes 895.05(7)b	NP
30. Fund for investigation and prosecution	NP	NP	NP	NP	Yes 2314.01(AG) 2314.03(DA)
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitation	NP	NP	NP	5 yrs. suspended 895.05(10)	Yes 2314G 7 yrs.
33. Construction	Liberal PL 91-452 § 904	Fair Import 701-104	Fair Import 105	Strict 775.021	Fair Meaning 13-104
34. Severability	NP	NP	NP	NP	NP
35. Findings and intent	Yes PL 91-452 § 1	NP	Yes 911a	NP	NP

	Rhode Island	New Mexico	Georgia	Indiana	New Jersey
ENACTED	1979	February 28, 1980	July 1, 1980	1980	June 15, 1981
AMENDED			April 16, 1982		
CRIMINAL ACTION					
1. Proceeding allowed	Yes 7-15	Yes 30-42	Yes 26-3401	Yes 35-45-6-1	Yes 2C:41-1
2. Brought by					
AG	NP	Yes 30-42-5	NP	NP	Yes 41-3(c)
DA	NP	Yes 30-42-5	NP	NP	Pros. Atty. 41-1(g) when authorized
3. Court	Superior 7-15-8	NP	NP	NP	NP
ACTS					
4. Prohibited Activities					
– investment of $ from pattern or debt	Yes 7-15-2(a)	Yes 30-42-4A	Yes 3403(a)	Yes -6-2(a)(1)	Yes 41-2(a)
– investment or control through pattern or debt	Yes 7-15-2(b)	Yes 30-42-4B	Yes 3403(a)	Yes -6-2(a)(2)	Yes 41-2(b)
– participation through pattern or debt	Yes 7-15-2(c)	Yes 30-42-4C	Yes 3403(b)	Yes -6-2(a)(3)	Yes 41-2(c)
– conspiracy to do the above	NP	Yes 30-42-4D	Yes 3403(c)	NP	Yes 41-2(d)
5. Pattern	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 30-42-3D	2 rel., 1 after eff. date, 1 w/in 4 yrs. of prior excl. imprisonment 3402(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -6-1(c)	2 rel., 1 after eff. date, 1 w/ in 10 yrs. of prior excl. imprisonment 41-1d(1), (2)
6. Predicate offenses	Yes 7-15-1(a)	Yes 30-42-3A	Yes 3402(a), (b)	Yes -6-1(d)	Yes 41-1(a)
7. Person	Yes 7-15-1(b)	Yes 30-42-3B	NP	NP	Yes 41-1(b)
8. Enterprise	Yes 7-15-1(c)	Yes 30-42-3C	Yes 3402(c)	Yes -6-1(b)	Yes 41-1(c)
9. State of mind	NP	NP	NP	Knowledge or Intent -6-2	NP
SANCTIONS					
10. Sanctions					
– imprisonment	Yes 7-15-3	Fel. 2° or 3° 30-42-3	Yes, 3404(a)	Class C Felony -6-2	1° w/gun 2° w/out 41-3(a)
– fine	Yes 7-15-3	Fel 2° or 3° 30-42-4A-D	Up to $25,000 or 3x gain to $25,000 3404(a), (b)	Class C Felony -6-2	1° with gun/ 41-3(a) 2° w/ out gun 41-3(a)
– forfeiture	Yes 7-15-3	Yes 30-42-4E	Yes via Civil Proc. 3405(a)	NP	Yes 41-3(b)
– costs	NP	NP	NP	NP	NP
11. Injunctive relief					
– restraining order	NP	Yes 30-42-4F	NP	NP	Yes 41-3(c)
– racketeering lien	NP	Yes 30-42-4F	NP	NP	NP
CIVIL SUIT					
12. Proceeding allowed	Yes 7-15-4	Yes 30-42-6A	Yes 3405(a)	Yes 34-4-30.5	Yes 41-4
13. Brought by					
– AG	Yes 7-15-4(b)	Yes 30-42-6B	Yes 3405(f)(1)	NP	Yes 41-4(b)
– DA	NP	Yes 30-42-6B	Yes 3405(f)(1)	Pros. Atty. -30.5-2	NP
– Private Party	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3405(f)(1)	Yes -30.5-2	Yes 41-4(c)
14. Court	Superior 7-15-4(a)	District 30-42-6A	Superior 3406(a)	Circuit or Superior -30.5-2	Superior 41-4(a)
15. Burden of Proof					
– Law	NP	NP	NP	Preponder. -30.5-2	NP
– Equity	NP	NP	NP	Preponder. -30.5-2	NP
16. Provision for innocent parties	Yes 7-15-4(a)	Yes 30-42-6C	Yes 3405(h)	Yes -30.5-2	Yes 41-4(a)
17. Preliminary relief	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3406(b)	Yes -30.5-5(a)	Yes 41-4(b)
– harm requirement	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
– bond is an option	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3406(b)	Yes -30.5-5(a)	Yes 41-4(b)

18. Showing for relief					
– general	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
– no special	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
19. Scope of equitable relief					
– divest	Yes 7-15-4(a)	Yes 30-42-6D1	Yes 3406(a)(1)	Yes -30.5-2(1)	Yes 41-4(a)(1)
– restrict	Yes 7-15-4(a)	Yes 30-42-6D2	Yes 3406(a)(2)	Yes -30.5-2(2)	Yes 41-4(a)(2)
– dissolve	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
– reorganize	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
– revoke permits	NP	NP	Yes 3406(a)(4)	Yes -30.5-2(4)	Yes 41-4(a)(5)
– forfeit charter	NP	NP	Yes 3406(a)(5)	Yes -30.5-2(5)	Yes 41-4(a)(4)
20. Scope of legal relief					
– amount	3x 7-15-4(c)	3x 30-42-6A	3x + punitive 3406(c)	3x + punitive -30.5-5(b)(1), (4)	3x 41-4(c)
– costs	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(2)	Yes 41-4(c)
– attorney fees	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(3)	Yes 41-4(c)
PROPERTY SUBJECT					
21. Type of property subject to forfeiture					
– real property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(2)
– personal property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(1)
– money	NP	NP	Yes 3405(a)	NP	Yes 41-3(b)(1)
– may substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY					
22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 7-15-7	NP	NP	NP	Yes 41-5
23. Seizure without process in certain instances	NP	NP	Yes 3405(d)(2)	Yes -30.5-4	NP
24. Relation back	NP	NP	Yes 3405(e)(11)(A)	NP	NP
25. Jury trial	NP	NP	Yes 3406(c)(1)	Yes -30.5-5(c)	NP
26. Estoppel	Yes 7-15-4(d)	NP	Yes 3406(d)	Yes -30.5-6	Yes 41-4(d)
27. Intervention by State	NP	NP	NP	NP	NP
28. Civil suit not precluded by criminal action	NP	NP	Yes 3408	NP	Yes 41-6.1
29. Priority of individual over State to compensation	NP	NP	Yes 3406(c)(2)	Yes -30.5-5(d)	NP
30. Fund for investigation and prosecution	NP	NP	NP	NP	Yes 41-3(b)
31. Reciprocity of enforcement	NP	NP	Yes 3409	NP	NP
32. Statute of limitation	NP	NP	5 yrs. suspended 3407	NP	NP
33. Construction	Liberal 7-15-10	Approved Usage 12-2-2	Fair Warning 26-102-b	Plain, ordinary usual sense 1-1-4-1	Liberal 41-6
34. Severability	Yes 7-15-11	NP	NP	NP	Yes 41-6.2
35. Findings and intent	NP	Yes 30-42-2	Yes 3401	NP	Yes 41-1.1

	Utah	Colorado	Idaho	Oregon	Wisconsin
ENACTED	July 1, 1981	1981	1981	1981	April 27, 1982
AMENDED					
CRIMINAL ACTION					
1. Proceeding allowed	Yes 76-10-1601	Yes 18-17-101	Yes 18-7801	Yes 166.715	Yes 946.80
2. Brought by					
AG	NP	NP	NP	NP	Yes 946.87(3)
DA	NP	NP	NP	NP	Yes 946.87(3)
3. Court	NP	NP	NP	NP	NP
ACTS					
4. Prohibited Activities					
– investment of $ from pattern or debt	Yes 1603(1)	Yes -104(1)	Yes 7804(a)	Yes .720(1)	Yes 946.83(1)
– investment or control through pattern or debt	Yes 1603(2)	Yes -104(2)	Yes 7804(b)	Yes .720(2)	Yes 946.83(2)
– participation through pattern or debt	Yes 1603(3)	Yes -104(3)	Yes 7804(c)	Yes .720(3)	Yes 946.83(3)
– conspiracy to do the above	Yes 1603(4)	Yes -104(4)	Yes 7804(d)	Yes .720(4)	NP
5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1602(4)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment -103(3)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 7803(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior .715(3)	3 rel., 1 after eff. date, last within 7 yrs. of prior. Mult. acts at same time & place count as 1 act 946.82(3)
6. Predicate offenses	Yes 1602(1)	Yes -103(5)	Yes 7803(a)	Yes .715(5)	Yes 946.82(4)
7. Person	Yes 1602(2)	Yes -103(4)	Yes 7803(b)	Yes .715(4)	NP
8. Enterprise	Yes 1602(3)	Yes -103(2)	Yes 7803(c)	Yes .715(2)	Yes 946.82(2)
9. State of mind	NP	NP	NP	NP	NP
SANCTIONS					
10. Sanctions					
– imprisonment	2° Felony 1603(5)	Class 2 Fel. -105(1)	Up to 14 yrs. 7804(e)	Class A Felony .720(5)(a)	Class C Fel. 946.84(1)
– fine	2° Felony 1603(5)	up to $25,000 -105(1)(a) up to 3x gain or harm -105(2)	Up to $25,000 7804(e)	Yes Or Up .730(5)(a) To 3x gain or harm .720(5)(b)	Up to 2x gain or loss 946.84(2)
– forfeiture	Yes 1603(5)	Yes -105(1)(b)	Yes 7804(f)	Yes .725	Yes 946.84(2)
– costs	NP	Yes with 3x fine or forfeiture -105(2) -105(6)(d)(II)	NP	Yes .720(5)(b)	Yes 946.84(2) greater penalties for "Continuing Criminal Enterprise" 946.85
11. Injunctive relief					
– restraining order	Yes 1603(6)	Yes -105(5)	Yes 7804(g)	Yes .725	NP
– racketeering lien	NP	NP	NP	NP	NP
CIVIL SUIT					
12. Proceeding allowed	Yes 1605(1)	Yes -106(5)	Yes 7805	Yes .725	Yes 946.86
13. Brought by					
– AG	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
– DA	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
– Private Party	Yes 1605(1)	Yes -106(6)	Yes 7805(a)	Yes .725(6)	Yes 946.86(4)
14. Court	District 1605(1)	District -106(1)	District 7805(c)	Circuit .725(1)	Circuit 946.86 Reas. Cert. 946.86(5)
15. Burden of Proof					
– Law	Preponder. 1605(2)	NP	NP	NP	
– Equity	Preponder. 1605(2)	NP	NP	NP	Reas. Cert. 946.86(5)

16. Provision for innocent parties	Yes 1605(2)	Yes -106(1)	Yes 7805(c)	Yes .725(1),(2)	Yes 946.86(1)
17. Preliminary relief	Yes 1605(3)	Yes -106(6)	Yes 7805(c)	Yes .725(5)	Yes 946.86(3)
– harm requirement	NP	Yes -106(6)	NP	NP	NP
– bond is an option	Yes 1605(3)	Yes -106(6)	Yes 7805(c)	Yes .725(5),(6)	Yes 946.86(3)
18. Showing for relief					
– general	NP	Yes -106(6)	NP	NP	NP
– no special	NP	Yes -106(6)	NP	Yes .725(6)	NP
19. Scope of equitable relief					
– divest	Yes 1605(4)(a)	Yes -106(1)(a)	Yes 7805(d)(1)	Yes .725(1)(a)	Yes 946.86(1)(a)
– restrict	Yes 1605(4)(b)	Yes -106(1)(b)	Yes 7805(d)(2)	Yes .725(1)(b)	Yes 946.86(1)(b)
– dissolve	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
– reorganize	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
– revoke permits	NP	Yes -106(1)(d)	Yes 7805(d)(5)	Yes .725(1)(d)	Yes 946.86(1)(d)
– forfeit charter	NP	Yes -106(1)(e)	Yes 7805(d)(6)	Yes .725(1)(e)	NP
20. Scope of legal relief					
– amount	3x + punitive 1605(1)	3x -106(7)	3x 7805(a)	3x + punitive .725(7)(a)	2x + punitive 946.86(4)
– costs	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
– attorney fees	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
PROPERTY SUBJECT					
21. Type of property subject to forfeiture					
– real property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
– personal property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
– money	NP	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
– may substitute other property if forfeited property is not available	Yes 1606(3)	NP	NP	NP	NP
PROCEDURE AND PRIORITY					
22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	Yes -107	NP	Yes .730	NP
23. Seizure without process in certain instances	NP	Yes -106(3)	NP	Yes .725(3)	NP
24. Relation back	NP	NP	NP	NP	NP
25. Jury trial	NP	Yes -106(7)(a)	NP	Yes .725(7)(b)	Yes 946.86(4)
26. Estoppel	Yes 1607	Yes -106(8)	NP	Yes .725(8)	Yes 946.86(6)
27. Intervention by State	NP	NP	NP	Yes .725(9)	NP
28. Civil suit not precluded by criminal action	NP	Yes -106(9)	NP	Yes .725(11)	Yes 946.87(2)
29. Priority of individual over State to compensation	NP	Yes -106(7)(b)	NP	Yes .725(7)(c)	Yes 946.86(2)(b)
30. Fund for investigation and prosecution	NP	NP	NP	NP	
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statue of limitation	NP	NP	NP	5 yrs. suspended .725(10)	6 yrs. suspended 946.87(1)
33. Construction	Fair Import 76-1-106	Liberal -108	Liberal 73-102(1)	Liberal .735(2)	Reasonable Intendment 990.001
34. Severability	NP	Yes -109	NP	NP	
35. Findings and intent	NP	Yes -102	Yes 7802	NP	Yes 946.81

	Illinois**	California	Connecticut	North Dakota	Nevada
ENACTED	August 18, 1982	1982	1982	1983	July 1, 1983
AMENDED					
CRIMINAL ACTION					
1. Proceeding allowed	Yes 56 1/2 § 1651	Yes Penal § 186	Yes 53-393	Yes 121-06.1	Yes § 207.350
2. Brought by					
AG	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	NP
DA	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	Pros. Atty. 207.430
3. Court	NP	Superior 186.5(c)(1)	Superior -398(a)	NP	NP
ACTS					
4. Prohibited Activities					
– investment of $ from pattern or debt	Yes 1654 § 4(b)	NP	Yes -395(a)	NP	Yes 207.400(a)
– investment or control through pattern or debt	Yes 1654 § 4(c)	NP	Yes -395(b)	Yes -06.1-03(1)	Yes 207.400(b)
– participation through pattern or debt	Yes 1654 § 4(d)	NP	Yes -395(c)	Yes -06.1-03(2)	Yes 207.400(c)
– conspiracy to do the above	NP	NP	NP	NP	Yes 207.400(h)
5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior. At least 1 must be Class X, 1 or 2 Felony 1653 § 3(b)	2 rel., 1 after eff. date, 1 w/in 10 Yrs. of prior excl. imprisonment 186.2(b)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -394(c)	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 207.390
6. Predicate offenses	Yes 1653 § 3(a)(1), (2)	Yes 186.2(a)	Yes -394(a)	Yes -06.1-01(2)(d)	Yes 207.360
7. Person	Yes 1653 § 3(c)	NP	Yes -394(d)	NP	NP
8. Enterprise	Yes 1653 § 3(d)	NP	Yes -394(c)	Yes -06.1-01(2)(b)	Yes 207.370
9. State of mind	NP	NP	NP	Knowing -06.1-03(3)	NP
SANCTIONS					
10. Sanctions					
– imprisonment	Class I Fel. 1655 § 5a1	NP	1-20 yrs. -397(a)	Class B Felony - 06.1-03(3)	5-20 yrs. 207.400(2)
– fine	Up to $100,000 1655 § 5(a)(2)	NP	or Up to $25,000 -397(a)	Class B Felony - 06.1-03(3)	Up to $25,000 or 3x 207.400(2) gain/loss 207 410
– forfeiture	Yes 1655 § 5(a)(3)	Yes 186.3, 186.7(a)	Yes -397(a)	NP	Yes 207.420
– costs	NP	NP	NP	NP	Yes 207.410(2)
11. Injunctive relief					
– restraining order	Yes 1655 § 5(c)	Yes 186.6(a)	Yes -398(a)	Yes -06.1 -04	Yes 207.430
– racketeering lien	NP	NP	Yes -399(a), 402(c)	Yes -06.1 -06	NP
CIVIL SUIT					
12. Proceeding allowed	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470
13. Brought by					
– AG	Yes 1656 § 6(b)	NP	NP	Yes -06.1-05(1)	Yes 207.490(4)
– DA	Yes 1656 § 6(b)	NP	NP	NP	Yes 207.490(4)
– Private Party	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470(1)
14. Court	Circuit 1657 § 7	NP	NP	District -06.1-05(2)	District 297.470(3)
15. Burden of Proof					
– Law	NP	NP	NP	Preponder. -06.1-05	NP
– Equity	NP	NP	NP	Preponder. -06.1-05	NP
16. Provision for innocent parties	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(2)	Yes 207.500(2)

17. Preliminary relief	Yes 1656 § 6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(5)
– harm requirement	NP	NP	NP	NP	NP
– bond is an option	Yes 1656 § 6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(5)
18. Showing for relief					
– general	NP	NP	NP	NP	NP
– no special	NP	NP	NP	NP	NP
19. Scope of equitable relief					
– divest	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(a)	NP
– restrict	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(b)	NP
– dissolve	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(c)	NP
– reorganize	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(d)	NP
– revoke permits	NP	NP	NP	NP	NP
– forfeit charter	NP	NP	NP	NP	NP
20. Scope of legal relief					
– amount	3x 1656 § 6(c)	NP	NP	3x 06.1-05(1)	3x 207.470(1)
– costs	Yes 1656 § 6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
– attorney fees	Yes 1C56 § 6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
PROPERTY SUBJECT					
21. Type of property subject to forfeiture					
– real property	Yes 1655 § 5(a)(3)	Yes 186.3(b), (c)	NP	Yes 06.1-05(4)(f)(1)	Yes 207.460(a)
– personal property	Yes 1655 § 5(a)(3)	Yes 186.3(b), (c)	NP	Yes 06.1-05(4)(f)(2)	Yes 207.460(a)
– money	Yes 1655 § 5(a)(3)	NP	NP	Yes 06.1-05(4)(f)(3)	Yes 207.460(a)
– may substitute other property if forfeited property is not available	NP	NP	NP	Yes 06.1-05(4)(g)	Yes 207.420(3)
PROCEDURE AND PRIORITY					
22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	NP	NP	Yes 06.1-07	NP
23. Seizure without process in certain instances	NP	NP	NP	NP	Yes 207.490(1)
24. Relation back	NP	NP	NP	Yes 06.1-06	NP
25. Jury trial	NP	NP	NP	NP	Yes 207.470(1)
26. Estoppel	Yes 1656 § 6(d)	NP	NP	Yes 06.1-05(6)	Yes 207.470(2)
27. Intervention by State	NP	NP	NP	Yes 06.1-05(10)	Yes 207.490(4)
28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 06.1-05(13)	Yes 207.470(4)
29. Priority of individual over State to compensation	NP	NP	NP	NP	Yes 207.470(1)
30. Fund for investigation and prosecution	Yes 1655 5(g)	NP	NP	NP	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statue of limitation	NP	NP	NP	7 yrs. 06.1-05(7)	5 years suspended 207.520
33. Construction	Liberal 1658 § 8	NP	NP	Liberal 1-02-01	Fair Import 193.030
34. Severability	Yes 1659 § 9	NP	Yes -403(b)	NP	NP
35. Findings and intent	Yes 1652 § 2	Yes 186.1	NP	NP	NP

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

Appendix B

The Racketeer Influenced and Corrupt Organizations Statute

WHEREAS, Congress enacted in 1970 the Racketeer Influenced and Corrupt Organizations provisions (Title IX) of the Organized Crime Control Act; and

WHEREAS, Title IX is applicable to patterns of racketeering activity involving:

1. personal violence;
2. provision of illegal goods and services;
3. corruption in private or public life; and
4. various forms of fraud; and

WHEREAS, Title IX provides important new criminal and civil sanctions to protect victims of racketeering activity, including,

1. criminal forfeiture of proceeds of racketeering activity;
2. criminal forfeiture of interests in enterprises;
3. equitable relief for the government;
4. equitable relief for victims of racketeering activity; and
5. treble damages, costs and attorneys fees for victims of racketeering activity; and

WHEREAS, twenty-two States have enacted legislation patterned after Title IX; and

WHEREAS, other States are actively considering the passage of legislation patterned after Title IX; and

WHEREAS, state and local units of government have begun to make effective use of Title IX and state legislation patterned after it; and

WHEREAS, Title IX provides important new sanctions in the area of fraud against state and local units of government; and

WHEREAS, fraud against state and local government has a multi-billion dollar annual import; and

WHEREAS, state and local units of government have found that Title IX and state legislation patterned after it are effective and essential means of redressing wrongs;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General supports efforts by states to enact legislation patterned after Title IX and to strengthen the criminal and civil provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General opposes efforts to repeal or modify, in whole or in part, the provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the Executive Director and General Counsel of the National Association of Attorneys General is authorized to transmit this Resolution to appropriate committees of Congress, the Administration, and other appropriate individuals and associations.

MOTION FILED
MAR 2 3 1985

No. 84-822

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.

PETITIONERS,

v.

HAROCO, INC., ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Motion for Leave to File a Brief and Brief of John Grado, on Behalf of Himself and Technographics, Inc., in Support of Respondents

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March 29, 1985

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

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Motion of John Grado on Behalf of Himself and Technographics, Inc. for Leave to File a Brief as *AMICUS CURIAE* in Support of Respondents

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John Grado ("Grado") respectfully moves, on behalf of himself and Technographics, Inc., pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*.

Respondents have consented to the filing of this brief. Petitioners have refused to consent to the filing.

Interest of John Grado

Grado is President and Chief Executive Officer of Technographics, Inc. ("Technographics"), a major American manufacturer of specialty paper products with industrial facilities in seven states and three foreign countries. Grado owns approximately 30.7 percent of the shares of Technographics.

Grado is the plaintiff, on behalf of himself and Technographics, in a derivative action, *John Grado* v. *Henry Gross et al.*, filed in the United States District Court for the District of Massachusetts (Civil Action No. 84-1087-MA) ("*Grado*"). The case arises under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The *Grado* complaint alleges that the defendants became holders of 57.3 percent of Technographics stock by carrying out various acts of mail, wire and securities fraud, by diverting a major corporate opportunity of Technographics, by "laundering" the proceeds through a Cayman Islands "shell" corporation which they controlled, and by using those proceeds to acquire majority control of Technographics. The District Court held that the facts alleged by Grado state a claim under 18 U.S.C. §§ 1962 (a), (b), (c) and (d) on behalf of the corporation. The District Court specifically rejected the *Grado* defendants' contentions that a "racketeering injury" need be pleaded in order to state a claim under civil RICO, as well as the requirement set out by the Court of Appeals for the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Sedima*") that a civil RICO plaintiff plead prior criminal convictions of defendants for RICO predicate acts.

Acting for himself, and on behalf of Technographics, Grado has an interest appropriate to qualify him as an *amicus curiae*. In the RICO cases currently before the Court, defendants are advancing arguments that would substantially curtail RICO's power to deter and to redress crime. At least one *amicus*, the American Bankers Association, has filed a brief in support of RICO defendants American National Bank and Trust Company, et al. In order to appreciate fully the implications of the proposed limitations on civil RICO, the Court should also hear and consider the viewpoint of the victims of RICO violations — victims whose rights Congress sought to vindicate with the civil RICO cause of action.

An unduly restrictive decision by the Court on the scope of civil RICO would be harmful to a large number of individual and corporate victims of RICO violations who are similarly situated to Grado and to Technographics. Grado and Technographics have suffered from precisely the sophisticated pattern of criminal activity that RICO was designed to attack. They properly may claim to represent the viewpoint of all such victims, and may appropriately advocate that civil RICO be preserved as an effective weapon against criminal acts in American interstate and foreign commerce.

Respectfully submitted,

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March 29, 1985

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No. 84-822

In the
Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,

PETITIONERS,

v.

HAROCO, INC., ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of John Grado, on Behalf of Himself and Technographics, Inc., in Support of Respondents

Interest of the Amicus Curiae

Grado is President and Chief Executive Officer of Technographics, Inc. ("Technographics"), a major American manufacturer of specialty paper products with industrial facilities in seven states and three foreign countries. Grado owns approximately 30.7 percent of the shares of Technographics.

Grado is the plaintiff, on behalf of himself and Technographics, in a derivative action, *John Grado* v. *Henry Gross,*

et al., filed in the United States District Court for the District of Massachusetts (Civil Action No. 84-1087-MA) ("*Grado*"). The case arises under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The *Grado* complaint alleges that the defendants became holders of 57.3 percent of Technographics stock by carrying out various acts of mail, wire and securities fraud, by diverting a major corporate opportunity of Technographics, by "laundering" the proceeds through a Cayman Island "shell" corporation which they controlled, and by using those proceeds to acquire majority control of Technographics.

Acting for himself, and on behalf of Technographics, Grado has an interest appropriate to qualify him as an *amicus curiae*. In the RICO cases currently before the Court, defendants are advancing arguments that would substantially curtail RICO's power to deter and to redress crime. At least one *amicus*, the American Bankers Association, has filed a brief in support of RICO defendants American National Bank and Trust Company, et al. In order to appreciate fully the implications of the proposed limitations on civil RICO, the Court should also hear and consider the viewpoint of the victims of RICO violations — victims whose rights Congress sought to vindicate with the civil RICO cause of action.

An unduly restrictive decision by the Court on the scope of civil RICO would be harmful to a large number of individual and corporate victims of RICO violations who are similarly situated to Grado and to Technographics. Grado and Technographics have suffered from precisely the sophisticated pattern of criminal activity that RICO attacks. They properly may claim to represent the viewpoint of all such victims, and may appropriately advocate that civil RICO be preserved as an effective weapon against criminal acts in American interstate and foreign commerce.

Issues Presented

I. Should the Court impose a judicially-created requirement that civil RICO plaintiffs plead a "racketeering injury", when the restriction is unsupported by the plain meaning of the words of the statute?

II. Should the Court impose a "racketeering injury" requirement upon civil RICO plaintiffs, when to do so would be in direct opposition to the intent of Congress that civil RICO deter and remediate the conduct attacked by the statute?

III. Where control over an entity is exercised and used to accomplish a pattern of racketeering activity, does such control constitute "conduct" or "participat[ion] . . . in the conduct" of an enterprise under 18 U.S.C. § 1962(c)?

IV. Where Petitioners, exercising control and direction of an enterprise, caused injury through a pattern of racketeering activity consisting of acts of mail and wire fraud, should the acts of Petitioners be immune from remedy under civil RICO?

Summary of Argument

The intent of Congress in enacting the civil provisions of RICO, 18 U.S.C. § 1964(c), was to provide a powerful new weapon against criminal conduct, and to place that weapon in the hands of private attorneys general. Neither the plain language of the statute nor the legislative history of RICO justifies the imposition of the highly restrictive limitations on civil RICO proposed by the Petitioners.

First: The proposed "racketeering injury" requirement rejected by the Seventh Circuit is an attempt to revive discredited prior efforts to limit civil RICO. Such proposed limitations improperly disregard Congress' intent that civil RICO act as

part of a broad attack on activity previously within the exclusive domain of state law. As Congress acted within its constitutional powers in creating civil RICO, the courts are without authority to restrict its application.

Second: The statutory language cannot support a "racketeering injury" requirement. Under the statute, "any person injured in his business or property by reason of a violation of § 1962" is provided a civil remedy. Use of the "by reason of" language of § 1964(c) to erect barriers to civil RICO plaintiffs misconstrues what is no more than a simple proximate cause requirement. The argument that a plaintiff's injury must flow not from the predicate acts but from the "pattern of racketeering activity" in order to be compensable distorts § 1964(c) beyond recognition. Such a proposed restriction is inconsistent with the specific statutory directive that RICO not supersede existing remedies available to a plaintiff under federal or state law, but rather afford additional remedies for injuries by violations of RICO.

Third: The legislative history does not support restrictive barriers to civil RICO actions. Underlying the statute was a congressional intent to provide a powerful new weapon against the proscribed activity. Congress was well aware that RICO would federalize claims previously reserved for the states. Congress consciously chose not to attempt to create status legislation aimed at particular groups, but rather to enact a statutory scheme directed at conduct. Congress specifically rejected the technical types of "standing" and "proximate cause" requirements developed under the antitrust laws, in favor of legislation which would preclude easy loopholes for RICO violators. Congress did, however, import into RICO from the antitrust laws the concept of private attorneys general, in order to strike at the economic roots of "organized" criminal activity. The petitioners' proposed limitation of civil RICO would contravene directly the expressed legislative intent.

Fourth: This Court may properly disregard alarmist claims that RICO is overbroad. Properly read, RICO contains sufficient "built-in" limitations to avoid offending the national interest. The requirement of 18 U.S.C. § 1962(c) that a defendant must "conduct or participate . . . in the conduct" of an enterprise through a pattern of racketeering activity limits liability of corporations to instances where the persons who exercise control or direction or make official policy are responsible for the acts complained of.

Fifth: Because Respondent alleges that both Walter E. Heller International Corporation ("Heller"), as parent of American National Bank and Trust Company of Chicago ("ANB"), and Ronald J. Grayheck, a senior officer and director of ANB, engaged in the pattern of mail and wire fraud proscribed by the statute, the facts set forth in Respondents' Complaint give rise to a civil RICO claim under § 1962(c). In order to preserve civil RICO as an effective weapon against criminal acts, the order of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") should be affirmed.

Argument

I. The Purported "Racketeering Injury" Requirement Is But Another in a Series of Discredited Attempts to Restrict Civil RICO.

A. *The Background of "Racketeering Injury": Earlier Attempts to Restrict Civil RICO*

The purported "racketeering injury" requirement rejected by the Seventh Circuit below must be seen in context. It is but the latest in a series of attempts by RICO defendants to restrict

the scope of civil RICO. Among the earliest lines of attack was the claim that RICO required a demonstration that the defendants belonged to "organized crime" (later, organized crime or its "penumbra"). This restriction has been roundly and properly discredited. It is now generally acknowledged that RICO applies to all who violate its provisions.[1]

Civil defendants have also urged that literal application of the civil RICO cause of action would unreasonably federalize the common law relating to business fraud. *See generally* Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237 (1982).[2] The plain answer to this argument is that set forth by the Court in its major decision on the scope of RICO, *United States* v. *Turkette*, 452 U.S. 576, 586-87 (1981) ("*Turkette*"):

[1] *Schacht* v. *Brown*, 711 F.2d 1343, 1353 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 508, 509 (1984); *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1280 (1984); *Bennett* v. *Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd en banc* 710 F.2d 1361, *cert. denied*, 104 S.Ct. 527 (1983); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *United States* v. *Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 830, 919 (1980); *United States* v. *Aleman*, 609 F.2d 298, 303-04, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 269 (W.D. Okla. 1983); *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977); *United States* v. *Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Eisenberg* v. *Gagnon*, 564 F. Supp. 1347, 1350-51 (E.D. Pa. 1983); *Spencer Cos., Inc.* v. *Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,361 at 92,214 (D. Mass. 1981); *United States* v. *Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980). *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237 (1982) (hereinafter "Blakey"), at 264-65 n.78, 270 and nn.94-95, 273 and n.112, 273-74 n.113, 275-76 n.116, 279; Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, at 1106-09 (1982).

[2] Professor Blakey's article, which urges a liberal interpretation of civil RICO, was cited by the Court with approval in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17, 27 (1983), as a guide to the legislative history of RICO.

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]. . . . That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. . . . There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

These observations were repeated with at least equal force in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("*Russello*").[3]

Resistance to the application of the plain language of civil RICO in the context of commercial fraud cases was reduced, but not quelled, by *Turkette* and continued in the guise of a purported requirement of "competitive injury" as a prerequisite

[3] Notwithstanding the position taken by the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482, 493-94 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985), the Court's interpretation in *Turkette* of Congress' intent as to the scope of RICO is properly controlling in the civil context. The statutory language for RICO criminal and civil liability is identical, and both provisions were drafted to serve the same anti-crime goals. For examples of reliance upon *Turkette* to interpret the scope of civil RICO, *see, Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985); *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 412 (8th Cir. 1984); *Furman* v. *Cirrito*, 741 F.2d 524, 527-28 (2d Cir.), *petition for cert. filed*, No. 84-604, 53 U.S.L.W. 3343 (October 15, 1984); *Schacht*, 711 F.2d at 1353; *Bennett*, 685 F.2d at 1060; *Kimmel* v. *Peterson*, 565 F. Supp. 476, 491 n.7 (E.D. Pa. 1983); *Eaby* v. *Richmond*, 561 F. Supp. 131, 134 (E.D. Pa. 1983).

to suit.[4] The majority of courts, including each Court of Appeals which has considered the issue,[5] has rejected this ill-defined limitation. In two well-reasoned decisions on this issue, United States District Court Judge Giles has pointed out the weaknesses of the "competitive injury" doctrine:

> [R]eading a competitive injury requirement into section 1964(c) would create an insurmountable practical problem . . . . As the Court in *Hanna Mining* [*Co.* v. *Norcen Energy Resources, Ltd.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,742 at 93, 737 (N.D. Ohio 1982)] noted, . . . [this requirement] . . . would leave undisturbed racketeers whose activity does not infringe on their competitor's markets. It is untenable to suggest that Congress intended such a result". [citation omitted] *Accord, Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

Kimmel v. *Peterson*, 565 F. Supp. 476, 495 (E.D. Pa. 1983).

> The legislative history of RICO evidences an intent to escape the restrictive antitrust standing principles. Sec. 1964(c) was added to battle organized criminal activity on a new front — its pocketbook. Since a competitive injury requirement would interfere with that goal and create cracks through which targeted behavior will slip, it must be rejected.

[4] *See, e.g., Bankers Trust Company* v. *Feldesman*, 566 F. Supp. 1235, 1240-41 (S.D.N.Y. 1983), *aff'd. on other grounds sub nom. Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir.), *petition for cert. filed* No. 84-657, 53 U.S.L.W. 3367 (October 24, 1984); *North Barrington Development, Inc.* v. *Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980).

[5] *Haroco*, 747 F.2d at 391; *Alexander Grant*, 742 F.2d at 413; *Furman*; 741 F.2d at 530-32 (2d Cir. 1984) (rejecting antitrust analogy); *Bankers Trust*, 741 F.2d at 516 n.6; *Sedima*, 741 F.2d at 496; *Schacht*, 711 F.2d at 1358; *Bennett*, 685 F.2d at 1058-59 and n.5.

In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation, 583 F. Supp. 1388, 1434 (E.D.Pa. 1984).

Though the "competitive injury" requirement has now generally been abandoned, several courts have attempted to impose limitations on RICO through the so-called "racketeering injury" requirement. This theory asserts that, despite the plain language of the statute stating no such requirement, the legislative history demanding broad weapons against crime, and the strength of this Court's language in *Turkette*, RICO pleading somehow requires "something more" to state a civil claim.

B. *The Purported Racketeering Injury Requirement*

In *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984) ("*Alexander Grant*"), the Eighth Circuit noted that "a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it." 742 F.2d at 413. The three decisions at the Circuit Court level that have purported to adopt some variant of this "something more" requirement appear to have three very different concepts in mind.

The decision of the Court of Appeals for the Second Circuit ("Second Circuit") in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Sedima*"), referred to the "racketeering injury" requirement as a matter of "standing to sue". 741 F.2d at 494. Such standing is achieved whenever there is either infiltration of legitimate business or injury to competition. 741 F.2d at 495-96. Because the rule in *Sedima* is one of "standing," it appears that the *Sedima* panel would allow remediation under RICO for the full injury caused by the entire

criminal scheme, once standing to sue is found.[6] However, because *Sedima* attempts to exclude categories of criminal behavior from RICO, the case has been properly criticized as a revival of the "organized crime" and "competitive injury" tests under a new name. *Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 394-95 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Haroco*").

The Second Circuit's opinion in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir.), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Bankers Trust*"), by contrast, fashioned a "racketeering injury" requirement by means of a radical, indeed almost total, curtailment of the injury for which any civil remedy may be had under RICO. Under the *Bankers Trust* analysis, RICO provides no remedy for any damage caused by all the crimes or predicate acts which make up the RICO violation. Rather, RICO's treble damage remedy is said to apply only to "distinct" injury which is separate from and in addition to all the injury flowing from the predicate acts and is, moreover, proximately caused by the "confluence" of the pattern of crime and the use of the pattern to "invest in, control, or conduct, a RICO enterprise." 741 F.2d at 516. The Court explained its concept as follows:

> If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured

[6] Significantly, footnote 41 of the *Sedima* opinion approves the result in *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), which upheld a company's claim under civil RICO to recover kickbacks it was forced to pay. There was no suggestion in that case that the company suffered separate and distinct damage from the kickbacks. The measure of damages would plainly be based on the amount of the kickbacks, which is to say the injury caused by the predicate acts.

> *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury.

Id. at 517 [emphasis in original].

There are logical problems with the *Bankers Trust* analysis, illustrated by the far-fetched examples of "racketeering injury" given in the opinion itself. *Id.* As the dissent in that case points out, in each example, whether compensable injury occurs depends either upon the conduct of the victim after the crime, or upon the fortuitous conduct of a non-party — a most unusual result. 741 F.2d at 522 n.1. As the opinion in *Haroco* correctly remarks, these examples given in *Bankers Trust* do not meet even the case's own criteria for "racketeering injury". *Haroco*, 747 F.2d at 394.

Such difficulties are inherent in the *Bankers Trust* test. Only a metaphysician can find a clear distinction between damage to victims caused by a series of related crimes and damage caused by the pattern of such crimes. As Judge Pratt noted in *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir.), *petition for cert. filed*, No. 84-604, 53 U.S.L.W. 3343 (October 15, 1984), injury from a RICO violation "in most cases will flow from the predicate acts", and the effect of the *Bankers Trust* rule is therefore to "sterilize civil RICO." 741 F.2d at 529. It is surely most illogical to suggest that Congress created a treble damage action which provides no remedy for most, if not all, of the criminal conduct which Congress intended to deter.[7]

[7] A similar criticism applies to the holding in *Sedima* that civil RICO liability can occur only when the defendants have been convicted of criminal violations. That ruling has no support in the language of the statute or in the legislative history. The treble damage concept of civil RICO is in fact based on a private enforcement model derived from antitrust treble damage actions. See discussion *infra* at notes 11 and 13 and accompanying text.

In its recent decision in *Alexander Grant*, the Eighth Circuit departed from the Second Circuit to fashion a less restrictive limitation on RICO. While requiring that a civil RICO plaintiff plead "something more" than the predicate acts themselves, the Eighth Circuit found the *Bankers Trust* test to be "far narrower" than its own. 742 F.2d at 413. In holding that the plaintiff's allegations were sufficient to state a RICO claim, the Eighth Circuit appeared to enunciate a rule that whenever the pattern of criminal acitivity in violation of RICO "enable[s]" the defendants to injure the plaintiff, a civil RICO action will lie. *Id.*

The Seventh Circuit in its recent *Haroco* decision, however, rejected all of these restrictions. The Court there stated:

> Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or inartfully drafted. RICO may be very broad, but there was nothing careless about its drafting.

747 F.2d at 398-99.

All the rules which would require a civil RICO plaintiff to plead "something more" than injury by the conduct that violates RICO are inconsistent with the plain language of RICO, and all would negate Congress' intent to attack those criminal endeavors. The *Haroco* court properly read the statute, and its order should be affirmed.

II. The Language of the Act Provides No Support for the Racketeering Injury Requirement.

As the Court noted in *Turkette*:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive".

452 U.S. at 580. Any construction of the statute must begin, moreover, with its unique clause requiring explicitly that the Act be "liberally construed to effectuate its remedial purposes", Pub. L. 91-452, 84 Stat. 922, § 904(a) (1970), *reprinted in* U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. (1970).

In *Turkette*, this Court rejected the First Circuit's suggestion that RICO did not reach the predicate acts committed in the context of wholly criminal enterprises. In so deciding, this Court placed great weight on the broad language of the statute and noted pointedly:

> Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate".

452 U.S. at 581.

The same logic applies to civil RICO. Section 1964(c) sets forth the civil RICO cause of action in words which are clear and plain: any person "injured by reason of" a violation of § 1962 may sue therefor. If Congress had meant to provide a remedy only for injury "other and different" than that caused

by the conduct which violates RICO, it could, and presumably would, have said so. Had Congress intended civil RICO liability to attach only when the defendants had been convicted, again, it could easily have said so. There is no special "standing" requirement stated in the language of the statute. No such restrictions apply to RICO, because none were intended.

Those courts which have sought to impose a "racketeering injury" requirement have relied upon the language of § 1964(c) requiring that the plaintiff be injured "by reason of" a violation of § 1962. These words, it is claimed, require that all the harm done by predicate acts receive no civil remedy under RICO. Common sense dictates, however, that the words "by reason of" are meant simply to state a proximate cause requirement. There is no suggstion in the language of the Act itself, or in its legislative history, that these mundane words were meant to erect a barrier that would effectively eliminate most or all RICO civil damage claims.

In enacting § 1964(c), Congress employed conventional words common to several statutory private rights of action,[8] words which say no more than that a plaintiff's injuries must be caused by the defendants' unlawful acts. It makes no sense to

[8] Examples of federal statutes employing identical "injured by reason of" language include: The Agricultural Fair Practices Act, at 7 U.S.C. § 2305(c) (providing cause of action for coercive, anti-cooperative tactics of produce buyers); the Garn-St. Germain Depository Institutions Act of 1982, at 12 U.S.C. § 1464(q)(3) (providing cause of action for tieing arrangements by thrift institutions) and 12 U.S.C. § 1975 (providing cause of action for tieing arrangements by banks); the Clayton Act at 15 U.S.C. § 15 (providing private right of action); 15 U.S.C. § 72 (providing damage action for injury by import "dumping"); the Consumer Product Safety Act, as amended, at 15 U.S.C. § 2072 (providing cause of action for violation of product safety rules); the Griffin-Landrum Labor Reform Act, at 29 U.S.C. § 187 (providing cause of action for unfair labor practices by unions); the Employers' Liability Acts, at 45 U.S.C. §§ 51 and 52 (providing cause of action to employee); and the Merchant Marine Act of 1936, at 46 U.S.C. § 1227 (providing cause of action for discriminatory agreements between carriers).

infer that Congress meant to impose radical constraints when it used these unremarkable words in RICO.

It is a fundamental axiom that judicial interpretation of a statutory provision must harmonize with the whole statute.[9] In this regard, the Court must interpret § 1964(c) in light of the particular language of the Act which states:

> Nothing in this title shall *supersede* any provision of Federal, State or other law imposing criminal penalties or *affording civil remedies in addition to those provided for in this title*.

Pub. L. 91-452, 84 Stat. 922, § 904(b) (1970) *reprinted in* U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. (1970) [Emphasis supplied]. In taking such care not to *supersede* existing remedies, Congress unambiguously stated that RICO was intended to provide further and more powerful civil remedies "in addition to" remedies already existing for the proscribed conduct under state and federal law. The plain language of this specific legislative directive that RICO provide additional remedies for such predicate acts is clearly contrary to the *Bankers Trust* holding that any injury caused by the predicate acts must be outside civil RICO.

III. The Legislative History Does Not Support a Restrictive Reading of Civil RICO.

The statutory history demonstrates Congress' rejection of technical limitations such as the purported "racketeering injury" requirement or the prior conviction rule of *Sedima*.

[9] *United States* v. *Morton*, ___ U.S. ___, 104 S.Ct. 2769, 81 L.Ed. 2d 680, 688 (1984); *see also Russello*, 78 L.Ed. 2d at 23-24.

In *Russello* v. *United States*, the Court stated:

> The legislative history clearly demonstrates that the RICO statute was intended to provide *new weapons of unprecedented scope* for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in enacting Pub. L. 91-452, 84 Stat. 922 (1970), is set forth in its Sec. 1. This statement dramatically describes the problem presented by organized crime. Congress declared, id., at 923: "It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

78 L.Ed. 2d at 26 [Emphasis supplied].

Organized crime was the prime target of RICO. However, Congress' concept of organized crime was broad and included the type of deception alleged in the present case. Congress viewed the concept of "organized criminals" as including far more than stereotypical Mafia enforcers.[10] Criminals in business suits were equally a target of the Act. *See Bankers Trust*, 741 F.2d at 521 (dissent of Cardamone, J., reviewing legislative history). Congressman Poff, a sponsor of the bill, remarked:

[10] "Organized criminals who injure business today do not look like stereotyped criminals. They are executives and technicians. Their forte is manipulation of computer information, tampering with accounting procedures, theft of trade secrets and invasion of confidential company files." *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on S. 30 and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 689 (1970) ("House Committee").

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime — as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344 (1970).

Congress was, moreover, aware that a bill which included a definition of "organized crime" would be objectionable "status based" legislation. 116 Cong. Rec. 35,204 (1970) (remarks of Congressman Poff). Congress therefore determined to create stiff penalties and powerful civil remedies to deter the *conduct* and *practices* typically employed by organized crime. Senator McClellan, a proponent of the tough approach which Congress endorsed, remarked that "the Senate report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime." McClellan, *The Organized Crime Act or its Critics: Which Threatens Civil Liberties*? 46 Notre Dame Law Rev. 55, 142 (1970) [Emphasis in original]. "Congress determined therefore not to attack a group of persons or any single organization, but to proscribe broadly those kinds of activities which are at the root of business crime." *Bankers Trust*, 741 F.2d at 521 (dissent of Cardamone, J.). The civil RICO cause of action was intended to be a powerful weapon in the attack on such criminal conduct.[11]

[11] The section of the Act which contains the private RICO cause of action was added by Congress upon the recommendation of the American Bar Association ("ABA"). Significantly, the ABA's report argued against an earlier pro-

Congress was well aware of the inclusive nature of RICO's language. Indeed, during the Congressional debate, RICO's opponents argued that RICO was "pregnant with the potential for abuse." H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4081 (views of dissenting Representatives). In drawing its conclusions in *Turkette* as to the breadth of RICO, the Court cited a variety of warnings by civil libertarian opponents to RICO concerning the purported overbreadth of the Act. 452 U.S. at 586-587.[12] None of RICO's proponents argued that RICO was narrow; rather, they argued that it was necessary. As one District Court stated in *Crocker National Bank* v. *Rockwell International Corp.*, 555 F. Supp. 47 (N.D. Calif. 1982):

> [T]he key purpose of RICO's civil remedy is to "divest the association of the fruits of its ill-gotten gains." *United States* v. *Turkette*, 452 U.S. 576, 585, 101 S.Ct. 2524, 2530, 69 L.Ed.2d 246, 249 (1981). This purpose would be severely undermined if persons who suffered direct harm from racketeering activity as defined by the statute could not recover in the absence of a showing of some "special" harm . . . *Such a rule would leave money derived from the actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators.*

posal to fashion RICO as an amendment to the Sherman Act. The report noted that such an approach would "create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery." The Report noted pointedly that "strict" antitrust requirements on matters such as "standing" and "proximate cause" were inappropriate for RICO. 115 Cong. Rec. 6995 (1969). Of course, the ABA recommendation to separate RICO from the Sherman Act was followed.

[12] In so concluding, the Court relied particularly upon Rep. Eckhardt's warning that RICO would "'mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm'". *Turkette*, 452 U.S. at 586-87.

Id. at 49-50 [Emphasis supplied]. Nowhere in the legislative history is there any statement, or even a hint, that Congress sought to impose a special standing requirement, "something more" injury rules, or a prior conviction requirement.

Congress borrowed from the antitrust laws the general concept of "private attorneys general".[13] Congress plainly intended that private parties be stimulated by the treble damage remedies and attorneys' fees provisions of civil RICO to act against criminal conduct through civil suit.[14] It would make no conceivable sense to combine such a scheme with a rule that makes the damage from the criminal acts specifically targeted by RICO immune from suit.[15] Only if civil RICO is given its intended effect will its usefulness be realized.

[13] The ABA recommended the inclusion of a private remedy "based upon the concept of § 4 of the Clayton Act [which provides] any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . . [15 U.S.C. § 15]. House Committee at 538, 543-44 (1970), *quoted in Econo-Car International* v. *Agency Rent-A-Car*, 589 F.Supp. 1368, 1375 (D.Mass. 1984). In addition, Rep. Poff noted that the provision was "another example of the antitrust remedy being adopted for use against organized criminality." 116 Cong. Rec. 35,295.

[14] *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974) *reh'g denied*, 503 F.2d 1403, *cert denied*, 420 U.S. 929 (1975) (articulating policy behind antitrust treble damage actions). Given the fact that prosecutorial resources are already limited, Congress rationally chose to supplement criminal RICO enforcement with private civil enforcement.

[15] The Second Circuit suggested in *Sedima*, 741 F.2d at 494-96 that a preclusive standing requirement for RICO plaintiffs is supported by an "analogous" requirement established for antitrust plaintiffs in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("Brunswick").

The *amicus* respectfully disputes this argument. First, as set forth incisively in *Haroco*, 747 F.2d at 391 and *Furman*, 741 F.2d at 530-32, the Court's holding in *Brunswick* rejected the request for damages caused by an *increase* in competition, because antitrust law promotes competition. RICO was intended to destroy racketeers and their enterprises. A proper analogy to *Brunswick*

IV. RICO Is Not Overbroad in Scope.

With RICO, both civil and criminal, Congress enacted a concerted, sustained offensive against criminal activity affecting interstate commerce and legitimate business and expanded the role of the federal courts in that offensive. Individual judicial expressions of concern with altering the balance of federal and state police powers are, perhaps, a euphemism for an unwarranted fear that a multitude of business fraud cases will appear on the federal docket, and that aggressive plaintiffs may wield the treble damage weapon too freely. These fears are overstated. Important limitations on RICO do in fact exist. They arise from the substantive language of § 1962, which was meant to define what is and is not a RICO violation. See generally, Note, *Civil RICO Comes of Age — Proposals for Reform*, 35 Rutgers L. Rev. 285, 327-40 (1983); Note, *Civil*

would hold that conduct that reduces crime should not violate RICO. However, *Brunswick* hardly supports a rule that "sterilizes" the civil RICO cause of action.

Secondly, it is clear from the legislative history that while Congress may have borrowed the powerful tools of the treble damage action and attorneys' fees from the antitrust laws, it explicitly did not intend to bring "the great complexity of antitrust law enforcement" into RICO. *See* 115 Cong. Rec. 9567 (1969) (quoted in *Furman* at 531). *See also Econo-Car International Inc.*, 589 F. Supp. at 1375-76.

Thirdly, antitrust law is in fact replete with examples of actions or occurrences which operate as "predicate acts" to an antitrust claim. For example, violent coercion of competitiors, bid rigging, fraud on the patent office, and other types of criminal conduct can subject the perpetrator to antitrust liability. When an antitrust plaintiff proves these acts, treble damage recovery is allowed for the entire injury caused by the course of anticompetitive conduct, including the "predicate acts".

Finally, it must be noted that RICO, for all its breadth, is a statute which defines specifically the types of activities which constitute the predicate acts. Courts must act at least as scrupulously in giving full effect to the detailed language of §§ 1961 and 1962 as they have in construing antitrust law, with its general prohibition against "combinations . . . in restraint of trade."

RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982).

Section 1962(a) applies only when the proceeds of crime are used to invest, or acquire an interest, in an enterprise — surely not an every-day occurrence. Section 1962(b) applies only when a criminal achieves or maintains an interest in, or control of, an enterprise by his criminal acts — that is, there must be a causal nexus between the criminal activity and the fact of maintaining interest or control. Both of these "anti-infiltration" sections are plainly of narrow applicability. The categorical rules in *Bankers Trust* and *Sedima* indiscriminately destroy the effect of even these very narrowly focused sections of RICO.

Section 1962(c) is admittedly broader, but reaches only those who actually "conduct" or "participate . . . in the conduct" of the affairs of an enterprise through a pattern of racketeering activity.[16] Claims by RICO opponents to the contrary notwithstanding, major financial institutions will not be found liable under § 1962(c), unless corporate officers with substantial control over the enterprise have caused it to participate in the business fraud involved. "[D]efendants, in raising the spectre of the opening of the litigation floodgates, overlook the fact that neither common law fraud nor securities law violates [sic] will, by themselves, be automatically eligible for redress through a civil RICO action; there is the additional requirement under sec. 1964(c) . . . that an interstate enter-

[16] In this proceeding, the Petitioners have seemingly abandoned their position, asserted below and adopted by *Sedima* and *Bankers Trust*, that the "by reason of" language of § 1964 should be used to narrow RICO. Rather Petitioners have placed primary reliance upon their construction of the words in § 1962(c): "conduct or participate . . . in the conduct of [the] enterprise". While properly protesting the propriety of raising this new argument on appeal, Respondents have also addressed these contentions. On the assumption that the Court will speak to this important issue, it is discussed here.

prise be conducted 'through' a pattern of such activity." *Schacht* v. *Brown*, 711 F.2d 1343, 1355 (7th Cir. 1983), *cert. denied* 104 S.Ct. 508, 105 S.Ct. 509 (1984).

When it is alleged that a pattern of racketeering activity has been "conducted" within the meaning of § 1962(c) by the owners, officers, employees or agents of a large institution, as is the case before this Court, two quite distinct questions arise: First, are the employees liable? And second, is the institution liable? The two questions are analytically distinct.

Plainly, under the definition of "enterprise" set out at § 1961 of the statute, the group of employees that carries out the criminal acts may itself constitute a RICO "enterprise", and the employees' conduct of such an "enterprise" may subject them to liability without regard to the role played by the institution that employs them.

The liability of the institution, however, turns on whether the acts complained of may fairly be said to be those of the institution itself, rather than simply the unauthorized acts of individual employees. One possible test would be analogous to that which the Court imposed in the area of municipal liability under 42 U.S.C. § 1983 in the case of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). There this Court held:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983. . . . [T]his case unquestionably involves official policy as the moving force of the . . . violation.

Id. at 694.

Likewise, where the criminal activity complained of is or has become a *de facto* custom or official policy of the institution, either by virtue of the affirmative acts of individuals who direct and control, or whose acts may fairly be said to represent, the official acts of the institution, or by virtue of the knowing acquiescence of such individuals, the institution should indeed be held accountable under RICO.[17]

The Amended Complaint of the Respondents plainly passes muster under this test. It alleges that Heller owns ANB and that Heller intentionally conducted mail and wire fraud through ANB (Amended Complaint, paras. 15-20). The allegations refer to the corporation as the actor that conducted the fraud; it is a fair inference that these acts represent the official acts and policies of Heller. A parent corporation is manifestly in a position to control and direct the acts of its subsidiary, and Heller is alleged to have conducted the affairs of ANB by a pattern of racketeering activity. It is further alleged that in so doing Heller acted together with defendant Ronald J. Grayheck ("Grayheck"), an ANB officer and director (and therefore, impliedly at least, a policymaker). Given the "notice pleading" policy of Fed. R. Civ. P. Rule 8, the Amended Complaint adequately alleges that Heller, ANB, and Grayheck violated civil RICO. Both Respondents and Petitioners will have the opportunity to test through discovery whether there is sufficient

[17] *See also Bankers Trust*, 741 F.2d at 524, where Judge Cardamone's dissent states that the "required nexus" for stating a § 1962(c) claim exists only when one is able to commit predicate acts solely by virtue of his position with the enterprise, or where the predicate acts are related to the activities of the enterprise. *See*, for example, *In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation*, 583 F. Supp. 1388 (E.D. Pa. 1984), where a 1962(c) claim was properly pleaded against Hutton, where Hutton had ignored a broker's prior violations of the Securities Acts, actively promoted him as a successful broker, and named him Portfolio Manager, a member of its Director's Advisory Council, and Vice President of the Company. To the extent that *Catanella* suggests that Hutton would be liable under RICO for mere negligence, rather than affirmative misconduct, it may be wrongly decided.

evidence of the involvement of those who direct, control, or make policy at Heller and ANB to prove these allegations of RICO liability.

In contrast, the test offered by Petitioners would virtually eliminate the attack on organized criminal behavior accomplished by § 1962(c). Petitioners would require that in order to state a claim under § 1962(c), a plaintiff must allege that the pattern of racketeering activity was "an integral part of the enterprise's affairs". (Brief for Petitioners at 17). As with the purported requirement of "racketeering injury" offered by Petitioners below, the test is vague and ill-defined, and Petitioners offer no examples of their concept. Presumably Petitoners would require a RICO plaintiff to allege that the RICO violation at issue was an essential or necessary part of the enterprise. Because § 1962(c) defines both civil and criminal violations, the petitioners' proposed limitation would present a barrier for federal prosecutors to overcome as well.

The practical difficulties in applying the petitioners' proposed test are illustrated in the case at bar. Petitioners of course claim that the conduct alleged in this case would fail the "integral relationship" test. Yet setting a "prime rate" and communicating with one's customers about it is an integral part of the banking business, and violating RICO in the course of such activity would indeed be a violation within the petitioners' own test.

To read the words "conduct or participate . . . in the conduct" to mean "participate as an integral part of the enterprise's affairs" is only, once again, to seek to graft onto RICO concepts and meanings which nowhere appear in the statute. These qualifying words are not included in the statute for good reason — Congress fully intended to cast the RICO net over criminal conduct in any and all enterprises operated through a pattern of racketeering activity. No immunity has been granted to first-time offenders. There is no reason to believe that Congress

intended to allow a claim of "good behavior most of the time" to be a defense in a case of intentional criminal activity that has damaged a RICO plaintiff.

This class of potential institutional RICO violators is admittedly broader than the class of institutions for whom racketeering is the main business of the enterprise. But Petitioners have failed to point out any policy or practical reason why otherwise legitimate enterprises that stoop to commit a pattern of racketeering activity should be immune from civil RICO.

The test proposed by Petitioners would in fact greatly weaken RICO as an instrument against organized crime. Sophisticated criminals who operate enterprises with crime as a dominant part of their business will surely take great pains to hide the fact. Under the petitioners' proposal, violators who hide most of their crimes would be protected from RICO claims or prosecution for those crimes which are discovered. The proposed "integral relationship" test is not supported by the language of the statute, by the legislative history, or by good sense. It should not be adopted.

In contrast, the "official act" test proposed by the *amicus* herein adequately strikes a balance between the need to stop organized criminal behavior and the need to impose RICO liability only on those corporatons which can fairly be deemed responsible for RICO violations. Under that test, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

V. This Court Should Preserve Civil RICO as an Effective Weapon Against Crime.

RICO case law to date has produced numerous examples of egregious criminal behavior of the type that civil RICO was indubitably designed to combat. Examples familiar to the Court are the facts of *Sedima* and *Bankers Trust*, and the kick-

back scheme properly held to violate RICO in *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981). A further example is the *Grado* case described above. In such cases, there is a plain and manifest national interest to be served by civil RICO in helping to free American interstate and foreign commerce from criminal conduct. In *Russello* the Court relied upon the following legislative history:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, *and the attack must take place on all available fronts*.

78 L.Ed.2d at 26 (quoting S.Rep.No. 91-617 at 79 (1969)) (Emphasis supplied). Civil RICO must, at the very least, be preserved in a manner which deters and remediates these egregious violations of law.

The facts of the instant case, while perhaps less suggestive of stereotypical "racketeering", are no less within the plain language of the statute and unambiguously constitute an intentional pattern of fraudulent and criminal acts which caused extensive economic harm. It follows that the Respondents' Amended Complaint pleads a civil RICO claim, that the decision of the Court of Appeals for the Seventh Circuit was correct on the merits, and that it should be affirmed.

It would, therefore, be inappropriate for the Court to curb civil RICO. The Court should reject attempts to break the sword that Congress forged.

Conclusion.

For the foregoing reasons, the order of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

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STATEMENT OF THE CASE[1]

Count I seeks judgment against American National Bank ("ANB"). (App. 64) Respondents borrowed money from ANB on eleven occasions during the period February 1979—April 1981. (App. 59-60, ¶¶ 10-13) The rate of interest was stated as an increment over ANB's prime rate (for example, "one percent over the bank's prime rate"). The loans, and numerous bills for interest thereafter, were based on ANB's representation that ANB would charge interest based on ANB's true prime rate. (App. 60, ¶ 14) At the time of each loan, ANB fraudulently concealed ANB's intention to declare and use a falsely excessive prime rate; thereafter, ANB concealed its true prime rate, declared and published falsely excessive prime rates and collected interest from Respondents on those fraudulent bases. (App. 60-61, ¶¶ 16-17)[2] The fraudulent acts and practices occurred on many occasions subsequent to February 1979. (App. 61, ¶ 18)

ANB is a bank that conducted Heller International Corp.'s commercial banking operations (App. 58, ¶¶ 3-5); ANB was a person that conducted, and participated in the conduct of, Heller's business and affairs. (App. 58, ¶ 5; App. 62, ¶ 20).

Count II, alleging the same acts of wrongdoing, seeks judgment against Heller and Grayheck. (App. 65) Ronald S. Grayheck was an officer and director of ANB. (App. 59, ¶ 6; App. 64, ¶ 25) Greyheck was a person who conducted, and participated in the conduct of, ANB's business and affairs

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[1] Petitioners' summary of the claim is unduly contentious and incomplete. This supplementary statement of the claim is necessary to cure those deficiencies. References herein are to the Appendix ("App. ____") to the *certiorari* Petition.

[2] The concluding sentence of Petitioners' summary of the claim understates the fraud claims ("In other words, Respondents allege that ANB employed a method to calculate prime rate in a manner different than that contained in the promissory notes"). (Petrs. Brf., 5)

through those fraudulent acts. (App. 60, ¶ 15; App. 61-62, ¶ 19) ANB was a wholly owned subsidiary of Heller and, during part of the relevant period, ANB was a wholly owned subsidiary of American National Corporation which was a wholly owned subsidiary of Heller. (App. 58-59, ¶ 5) A substantial portion of Heller's commercial banking business was conducted through ANB. (App. 58, ¶ 5; App. 64, ¶ 25) Various officers and directors of Heller were officers and directors of ANB. (App. 64, ¶ 26) Grayheck and Heller were persons that committed the mail frauds while conducting, and participating in the conduct of, the business and affairs of ANB. (App. 64, ¶¶ 24, 26)

SUMMARY OF ARGUMENT

Petitioners' brief fails to address the question on which this Court granted *certiorari*. The question presented is whether a RICO[3] plaintiff must show more than damage solely by reason of the defendant's commission of the statutorily proscribed offenses. That question requires interpretation of 18 U.S.C. § 1964. Its resolution affects only civil cases.

Instead, Petitioners urge this Court to interpret Section 1962, the part of RICO that defines the violations for both criminal and civil cases. The arguments of Petitioners were neither made in nor considered by the District Court or the Court of Appeals. In addition, Petitioners' arguments have no place in this case because the persons sued are "managers", whose unlawful conduct was clearly integral to their respective enterprises.

Section 1962(c) embraces offenses committed by any person in the course of his association with an enterprise or

[3] RICO is an acronym for the Racketeer Influenced and Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (herein "the Act"), Title IX of Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968).

while participating in its affairs, at any level of the enterprise. This is made clear by Congress' avoidance of words imparting supervision or direction and Congress' intended meaning of the word "conduct" elsewhere in the Act. The interpretation urged by Petitioners of the word "conduct" would insulate those low level criminals who most frequently commit RICO's predicate offenses.

Section 1962(c) embraces offenses irrespective of how unimportant the offenses may be to the enterprise, compared with the rest of the enterprise's affairs. Petitioners' argument would exclude from RICO's coverage almost all instances in which persons loot enterprises or abuse their enterprise-based positions, such as in bribery, kickbacks and bankruptcy fraud. Petitioners' interpretation would encourage, rather than discourage, infiltration of criminals into legitimate businesses.

There is no such thing as a distinct "RICO" or "racketeering" injury. The District Court incorrectly required that a civil claim survive a but-for test regarding the connection between the pattern of racketeering activity and the injury. The decision of the District Court and the opinions endorsed by it merely renew the discredited notion that RICO only covers activities committed by "organized crime". The language of the Act, including the grant of a private treble damage remedy, shows Congress' intention to attract broad and energetic private enforcement of RICO. It is not up to the courts to frustrate Congress' intentions, irrespective of the burdens imposed on the courts.

The interpretations urged by *amicus* American Bankers Association are outside the question presented and are inapposite to this case. Those arguments also inject unsupportable and unworkable definitions into the statute.

ARGUMENT

Introduction

Respondents first respond to Petitioners' arguments. In Part II, Respondents discuss the question presented. In part III, we respond to the arguments of *amicus* American Bankers Association.

I

PETITIONERS' ARGUMENTS ARE BOTH INCORRECT AND NOT PROPERLY BEFORE THE COURT

Introduction

The District Court dismissed the complaint because it failed to allege any injury other than the injuries resulting from the mail fraud (*Haroco,* App., 3),[4] based on the District Judge's conclusion that injuries resulting from the predicate acts are insufficient.[5] (*Haroco,* App., 5) In the Court of Appeals, Petitioners argued that "Plaintiffs failed to allege the requisite causal relationship between their injuries and the RICO violations" (*Haroco,* App., 3) and that Plaintiffs "had not alleged the proper *type of injury* for a RICO claim". (*Haroco,* App., 13) (Emphasis added)

Apparently recognizing the futility of their arguments in the Seventh Circuit, Petitioners now shift to a pair of entirely new arguments never made in or considered by the Seventh Circuit: (1) that in order for a person to "conduct" the affairs of an enterprise he must be in a managerial position (Petrs. Brf., 11, 17), and (2) that the offenses must comprise an integral part of the enterprise's business.

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[4] Citations to the Seventh Circuit's opinion in this case are to the Appendix to the *certiorari* petition: "(*Haroco,* App., _____)".

[5] The term "predicate acts" refers to the racketeering activities enumerated in 18 U.S.C. § 1961(1).

Moreover, Petitioners' arguments would not be dispositive of this case. Accordingly, Petitioners' arguments ought not be considered. However, we respond to them herein, in case this Court desires to rule on Petitioners' contentions.

A. Petitioners' Arguments Are Not Properly Before This Court

Petitioners' first point is that there is no violation of Section 1962(c) unless it is proved that the person who "conducts" the affairs of an enterprise occupies a high enough level of authority to "lead", "direct the course of", "manage" or "have the direction of" the enterprise. (Petrs. Brf., 17) The question presented does not call for interpretation of Section 1962, which defines the RICO criminal offenses. The question presented *assumes* a violation of Section 1962(c) (as did the Seventh Circuit) and calls for interpretation of the "by reason of" clause in Section 1964(c). As stated by the Seventh Circuit:

> The central issue concerns the type of injury a private civil plaintiff must allege to support a RICO claim under 18 U.S.C. § 1964(c).

(*Haroco,* App., 1)

Certiorari was not sought on the issues now raised by Petitioners' arguments. Since those issues are outside the question presented, it is improper for Petitioners to raise them. Supreme Court Rule 34.1(a). Since Petitioners did not make these arguments below, Petitioners have waived them.[6]

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[6] One of Petitioners' waived arguments, that a person must "conduct" the enterprise's affairs from a managerial loft, goes to the conduct of ANB's affairs by Grayheck and Heller. Regarding Heller's conduct of ANB's affairs, the Seventh Circuit explicitly declined to rule since "the Defendants have not raised the point and the district court did not pass on it". (*Haroco,* App., 38, n.23)

B. The Act Does Not Require That The Offender Be A "Manager" Or That His Offenses Comprise An Important Aspect Of The Enterprise's Affairs

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Petitioners' argument that there is no RICO violation unless the person committing the crimes "managed" the enterprise, would read Section 1962(c) as though it provided: any person who "manages or directs the affairs of an enterprise". As stated in *Russello v. United States,* ____ U.S. ____, 104 S. Ct. 296, 300 (1983), "the short answer is that Congress did not write the statute that way".

The statute includes any persons who "participate . . . in the conduct of such enterprise's affairs". The ordinary meaning of the word "participate" is "to take part", "to have a part or share in something". *Webster's New Collegiate Dictionary,* 845 (1973). The statute is not limited to persons who "conduct" the enterprise's affairs but includes persons who take part (*any* part) in the conduct of the enterprise's affairs.

Petitioners' suggested interpretation also elides the phrases "employed by", "associated with" and "directly or indirectly". If Congress intended the narrow meaning imparted by Petitioners, mere employees would not be covered, nor would persons merely "associated with" any enterprise be covered, especially inasmuch as the terms of the statute cover persons "indirectly" associated with the enterprise. The purpose of these terms in Section 1962(c) was to cover both insiders and outsiders. *Schacht v. Brown,* 711 F.2d 1343, 1360 (7th Cir.), *cert. denied,* 104 S. Ct. 508 (1983). As stated in *Schacht:*

> Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. (Citations and footnote omitted)

(*Id.*)

The resolution of questions of statutory interpretation is aided by reference to interpretation of other statutory provisions using the same language regarding the same general subject. *Northcross v. Bd. of Ed. of Memphis City Schools,* 412 U.S. 427, 428 (1973) (per curiam); *de los Santos v. INS,* 525 F. Supp. 655, 666 (S.D.N.Y. 1981), *aff'd,* 690 F.2d 56 (2d Cir. 1982); *Cook v. Budget Rent-A-Car Corp.,* 502 F. Supp. 494, 500 (S.D.N.Y. 1980). While the verb "conduct" was not defined in the Senate or House reports on RICO, the use of that word in Title VIII of the Act[7] was explained as follows:

> The term 'conduct' refers both to high level bosses and street level employees.

H.R. Rep. No. 1549, 91st Cong., 2d Sess., 52-54 (1970) (commenting on 18 U.S.C. §§ 1511 and 1955). Congress could hardly have intended the word "conduct" to have two different meanings in the same statute.

The absence of the words "manage" and "control" in Section 1962(c) is significant in light of Congress' use of those words elsewhere in Title VIII which provides, in part, as follows:

> Whoever conducts, finances, *manages, supervises, directs,* or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both. (Emphasis added)

18 U.S.C. § 1955(a). *See also,* 18 U.S.C. § 1511 (same language). If Congress thought the word "conducts" means only "manages" or "directs", Congress would have seen no need to include those words in § 1955(a).

The meaning of the word "conducts" in Title VIII is instructive. This Court has held that in 18 U.S.C. § 1955, it means "any degree of participation" in an illegal gambling

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[7] Pub. L. No. 91-452, Title VIII, § 802-803, 84 Stat. 936-938 (codified at 18 U.S.C. §§ 1511, 1955).

business (except participation as a mere customer). *Sanabria v. United States,* 437 U.S. 54, 70 (n.26) (1978).[8]

Not surprisingly, Petitioners do not cite a single court agreeing with their argument. Virtually all of the courts confronting this and related arguments have concluded that an individual conducts or participates in the activities of an enterprise through a pattern of racketeering when: (1) the defendant's relationship with the enterprise facilitates his commission of the offenses, and (2) the predicate offenses are related to or have some effect on the enterprise.[9] In accord with these principles, low-level functionaries within an enterprise and individuals outside the enterprise have routinely been held accountable under Section 1962(c).[10]

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[8] Under Section 1955, numerous non-managerial employees and associates were held to have "conducted" illegal gambling activities. *See, e.g., United States v. Merrell,* 701 F.2d 53, 55 (6th Cir.), *cert. denied,* 103 S. Ct. 3558 (1983) (waiter/janitor); *United States v. Colacurcio,* 659 F.2d 684, 688 (5th Cir.), *cert. denied,* 455 U.S. 1002 (1982) (waiter/security guard); *United States v. Mackey,* 551 F.2d 967, 969 (5th Cir. 1977) (street sellers); *United States v. Manson,* 494 F.2d 804, 807 (7th Cir.), *cert. denied,* 419 U.S. 994 (1974) (runners).

[9] *See, e.g., United States v. Jannotti,* 729 F.2d 213, 226 (3d Cir.), *cert. denied,* 105 S. Ct. 243 (1984); *United States v. Cauble,* 706 F.2d 1322, 1332-3 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 996 (1984); *United States v. Provenzano,* 688 F.2d 194, 200 (3d Cir.), *cert. denied,* 459 U.S. 1071 (1982); *United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

[10] *See, e.g., United States v. Ambrose,* 740 F.2d 505, 512 (7th Cir. 1984) (policemen protecting narcotics dealers); *United States v. Truglio,* 731 F.2d 1123, 1133 (4th Cir.), *cert. denied,* 105 S. Ct. 197 (1984) (courier for prostitution ring); *Schacht v. Brown,* 711 F.2d at 1360 (outside corporation); *United States v. Martino,* 648 F.2d 367, 382 (5th Cir.), *cert. denied,* 456 U.S. 949 (1982) (low echelon participants in arson ring); *United States v. Chovanec,* 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (broker for enterprise). Regarding persons outside the enterprise, *Bennett v. Berg,* 710 F.2d 1361, 1364 (8th Cir. 1983) (*en banc*), appears to be *contra* ("some participation in the

(Footnote continued on following page.)

When an offered interpretation conflicts with the plain meaning of the words used by Congress, there must be something in the legislative history or the statement of Congress' purpose to justify it. *Consumer Product Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108 (1980). Even then, it is "a step to be taken cautiously". *American Tobacco Co. v. Patterson,* 456 U.S. 63, 75 (1982). The only legislative history cited by Petitioners (Petrs. Brf., 20-21) is a remark of Congressman Celler which did not purport to describe his view of the full extent of RICO's coverage: "The conduct of the affairs . . . by a person acting in a managerial capacity . . . is also proscribed". 116 Cong. Rec. 35,196 (1970). The fact that managerial misconduct is included does not support the negative inference that offenses committed at lower levels are excluded. *Cf. United States v. Turkette,* 452 U.S. 576, 591 (1981).

Instead of effectuating Congress' intention to eradicate organized crime and its evil influences, *Turkette,* 452 U.S. at 589, Petitioners' interpretation would lead to absurd consequences. For example, the exclusion of all offenders except an enterprise's managers would insulate the low level operatives of organized crime who typically engage in murder, kidnapping, arson, extortion—the most frightening of the predicate acts—on orders from higher ups. It is very doubtful that Congress intended to deprive United States Attorneys of the potent immunity weapon routinely used to obtain the cooperation of foot soldiers in order to convict their overlords.[11]

(Footnote continued from preceding page.)

operation or management of the enterprise" is required) but it is unclear whether the court intended the words "operation" and "management" to mean different things.

[11] Statement of Sen. McClellan, 116 Cong. Rec. 18,913 (1970) (One of Congress' principal concerns was the apparent "immunity from legal accountability" enjoyed by organized crime, especially "organized crime leaders").

Congress clearly intended RICO to embrace all functionaries who engage in patterns of racketeering activity, not just those who direct or manage the enterprises with which they are associated.

Petitioners next argue that Section 1962(c) is violated "only when the racketeering activity is being used as an integral part of the enterprise's affairs" (Petrs. Brf., 17); Petitioners equate that with racketeering activity which is "an inseparable part of the management of the business". (Petrs. Brf., 18) This argument again imbeds the misapprehension that "management" of the enterprise is RICO's only focus.

Simply stated, Petitioners' argument is that Section 1962(c) requires that the pattern comprise an important part of the enterprise's business. According to Petitioners, this is necessary in order to give any effect to the words "conduct", "affairs" and "through". As stated by Petitioners, Section 1962(c) was not violated because the alleged acts of racketeering were "merely incidental to ANB's banking business" (Petrs. Brf., 18) and "even more incidental" to Heller's ownership of ANB. (*Id.*) This suggestion of how Section 1962(c) ought to be interpreted is supported by no citations of cases, commentaries, or legislative history. This interpretation impermissibly constricts the application of Section 1962(c).

If it were necessary to show that every RICO defendant's unlawful participation was an integral or important part of the enterprise's business, rather than an "incidental" or "unimportant" part of its business, proof would be required of the full range of the enterprise's activities. Obviously, calculating the illegal portion of anything cannot be done without an assessment of the total. In cases of thoroughly corrupt organizations (as in *Turkette*), that would be virtually impossible because of the clandestine nature of such organizations. In cases involving legitimate enterprises (or partly legitimate enterprises), the

prosecutor or plaintiff would have to (1) portray the full scope and nature of all of the enterprise's business transactions, (2) portray the full scope and nature of the person's racketeering activities and (3) compare the two in order to assess the ratio between (1) and (2). Of course, Petitioners' theory would require both a quantitative and qualitative assessment of both the person's racketeering participation and the enterprise's other (lawful and unlawful) activities.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968), an important reason for this Court's rejection of the passing-on defense was that it "would often require additional long and complicated proceedings involving massive evidence and complicated theories". Senator McClellan's statement offers ample support for observing that principle in the context of RICO:

> There is . . . no intention here of importing the great complexity of antitrust law enforcement into this field.

115 Cong. Rec. 9567 (1969).

Petitioners' interpretation of Section 1962(c) would encourage criminals to disperse their activities into the frameworks of numerous large and legitimate businesses, thereby placing themselves in remote and "incidental" corners of those enterprises. Petitioners' gloss on the word "participation" would thus provide the incentive to infiltrate legitimate enterprises. Clearly, that is not what was intended by the Act.

Both of Petitioners' arguments are tied to the incorrect view that RICO's sole target is the infiltration of organized crime into legitimate business. (Petrs. Brf., 15-16) Petitioners' argument elides Section 1962(c). Subsections (a) and (b) are aimed at infiltration: subsection (a) forbids the use of racketeering income to invest in an enterprise; subsection (b) forbids the use of racketeering activities to acquire or maintain an interest in an enterprise. Section 1962(c) has no element of "infiltration". Subsection (c) is aimed at illicit conduct that

occurs in conjunction with an enterprise, irrespective of the manner in which the person became associated with the enterprise. The person may have been hired at a time when the enterprise was completely legitimate or he may have become associated with it at a time when he did not intend to act illegally. Section 1962(c) does not require proof of a violation of Section 1962(a) or (b).

Requiring the offenses to be integral to the enterprise's management would nullify important parts of RICO. Looting an enterprise from within is one of the evil practices specifically decried by Congress, several forms of which are embezzlement, 18 U.S.C. § 1961(1)(B) and (C), and bankruptcy fraud, 18 U.S.C. § 1961(1)(D). In such crimes, an insider lines his pockets to the enterprise's detriment, not in furtherance of its business. Another evil targeted by RICO is criminal conduct in which a person abuses his position in an enterprise, for example, bribery. 18 U.S.C. § 1961(1)(A). Neither of these two principal targets of RICO involves racketeering activities that are "integral" to the enterprise's affairs. Under Petitioners' suggested view, none of these offenses would be a violation of Section 1962(c) (or *any* of the three subsections of Section 1962).[12]

Petitioners' argument thus comes full circle. Beginning with the premise that infiltration is the exclusive target of RICO, Petitioners end up with an interpretation of Section 1962(c) under which many offenses that injure enterprises would not result in criminal or civil liability.

The only necessary nexus between the racketeering activities and the enterprise's affairs is that the predicate acts take

[12] It is no answer to suggest that the defendant and his criminal confederates might comprise an enterprise (an "association") separate from the "business". In many cases the defendant/person may be acting without any confederates, for example where he is an embezzler; or he may have confederates but their existence might be unknown or not provable.

place in the course of the offender's participation in the enterprise. It is not required that the racketeering benefit or further the enterprise's business.[13] But if Petitioners' interpretation had been followed, many of the Government's recent successes in using RICO as an effective tool in the war against crime would have been impossible.[14]

Petitioners' statement that RICO was designed only for "circumstances in which the alleged racketeering activity is the means by which a person is conducting and directing the affairs of an enterprise" (Petrs. Brf., 11) puts it backwards. RICO applies where the enterprise is the means by which the person engaged in the racketeering activity.

C. Ruling On Petitioners' Arguments Would Have No Impact On This Case

In any event, the argument that only a "manager" is liable is futile because of the allegations that Petitioners "conducted" the enterprises, even in the narrow sense urged by Petitioners.

The complaint alleges that Grayheck was an officer and director of ANB (App. 59, 64) and Heller was ANB's wholly-owning parent. (App. 58-59) If ANB's affairs were not conducted or managed by its officers, directors or parent corporation, then ANB's business was not conducted by anyone. Similarly, ANB conducted Heller's affairs (App. 58, 62) and a "substantial portion" of the commercial banking oper-

[13] *See, e.g., Cauble,* 706 F.2d at 1333 (n.24); *Provenzano,* 688 F.2d at 200; *United States v. Hartley,* 678 F.2d 961, 990-1 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983); *United States v. Welch,* 656 F.2d 1039, 1061-62 (5th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982); *United States v. Webster,* 669 F.2d 185, 187 (4th Cir.), *cert. denied,* 456 U.S. 935 (1982).

[14] *See, e.g., United States v. Kovic,* 684 F.2d 512 (7th Cir.), *cert. denied,* 103 S. Ct. 304 (1982); *United States v. Welch,* 656 F.2d 1039 (5th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

ations of Heller was performed by ANB. (App. 58, ¶ 5; App. 64, ¶ 25) Even by Petitioners' exaggerated view of what is meant by the word "conduct", far less involvement and direction of the affairs of these two enterprises would suffice.

Even if these allegations left doubt about whether the alleged persons occupied managerial and directional positions at high enough levels, it would be a matter of proof, not pleading. *See, Conley v. Gibson,* 335 U.S. 41 (1957). The complaint alleges that Heller and Grayheck were persons "who conducted, and participated in the conduct of, ANB's business and affairs". The truth or falsity of those allegations must be measured by Respondents' proof of facts, either at trial or by summary judgment. 2A *Moore's Federal Practice,* ¶ 8.13 at 8-119 (2d Ed. 1984).

Petitioners' second argument, that an integral relationship is required between the racketeering activity and the enterprise's affairs (Petrs. Brf., 17) is also futile. Petitioners assert that the complaint fails this test because neither Heller nor Grayheck was directing or managing ANB's business through the fraudulent practices (*Id.*) and that ANB did not conduct Heller's business through that pattern of racketeering activity. (*Id.,* p. 18)

Here again, the complaint meets even Petitioners' narrow test, alleging that ANB conducted Heller's business and affairs through the fraudulent loans and collections of interest (App. 61-62, ¶¶ 19, 20) and that Grayheck and Heller conducted ANB's affairs through that pattern of racketeering activity. (App. 64, ¶ 26) Petitioners' argument goes to the extent to which Respondents' *evidence* must prove a nexus between the offenses committed by the persons and the respective enterprises they were serving.

The interpretations urged by Petitioners are incorrect and inapposite to this case.

II

THE DISTRICT COURT'S REQUIREMENT OF SOMETHING MORE THAN HARM RESULTING FROM THE PREDICATE ACTS INJECTED UNINTENDED WORDS AND MEANINGS INTO RICO

Introduction

Despite Petitioners' abandonment of the question presented, Respondents here discuss that issue because this Court has decided that its importance is worthy of consideration.

A. The District Court's Imposition Of A "Racketeering Injury" Requirement Is Indecipherable

The District Court dismissed the complaint for want of a "RICO injury", following the opinions of several other courts. *Haroco v. American Nat. Bank & Trust Co.,* 577 F. Supp. 111, 113-114 (N.D. Ill. 1983). Those opinions, sometimes referring to "racketeering enterprise injury" or a "distinct RICO injury", invariably begin and end with the requirement that plaintiff show "something more" than injury suffered from RICO's predicate acts.[15]

The "racketeering injury" doctrine is difficult to pin down because it is never defined and those courts adhering to it do not announce what "more" is required than injury resulting from the predicate acts. *See, e.g., Sedima, S.P.R.L. v. Imrex Company, Inc.,* 741 F.2d 482, 494 (2nd Cir. 1984) ("whatever it may be"). This undefined requirement has evoked bafflement from many courts.[16]

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[15] *See* district court cases collected in the Court of Appeals' opinion in *Haroco,* App., 7 (n.4), also listing district court cases rejecting the racketeering injury doctrine. (*Id.,* at 7-8)

[16] *See, e.g., Haroco,* App., 6 ("the district court here did not explain what the requirement is"); *Haroco,* App., 9 ("Neither the district court nor the defendants in their brief have made any effort to

(Footnote continued on following page.)

Beginning with the words of the statute, as we must, *United States v. Turkette,* 452 U.S. at 580, the requirement of "something more" is noticeably absent. If Congress had intended something more than injury occasioned by the predicate acts, it could easily have articulated the extra requirement. The District Court's decision leaves litigants in the dark about whether thay have meritorious claims. For all Respondents can tell, their claims might qualify, unless, as the Seventh Circuit concluded, this doctrine is a mere extension of the discredited "organized crime requirement". (*Haroco,* App., 20, 22)[17]

B. The But-For Test Of Proximate Cause Is Not Applicable To The Pattern Requirement

The District Court, demanding proof that the injury resulted from a racketeering pattern, apparently engaged in a but-for analysis.

In *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* (No. 84-657), the Second Circuit attempted to define "racketeering injury" in terms of the but-for reasoning on which rests the "something more" holdings in *Landmark Savings and Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981), *North Barrington Development, Inc. v.*

(Footnote continued from preceding page.)

define the requirement ...."); *Eisenberg v. Gagnon,* 564 F.Supp. 1347, 1352-3 (E.D. Pa. 1983) ("Although the Defendants argue that 'something more than an injury stemming from racketeering activity must be alleged' ... it has not been made clear either by the Defendants or the cases so requiring it what that 'something more' would be"). *See also, Alexander Grant & Co. v. Tiffany Industries, Inc.* 742 F.2d 408, 413 (8th Cir. 1984), *petition for cert. filed,* (No. 84-1084); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983).

[17] In *Willamette Savings & Loan v. Blake & Neal Finance Co.,* 577 F. Supp. 1415, 1430 (D. Ore. 1984), the District Judge adopted the comment on pornography in *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart J., concurring) ("I know it when I see it") as the test to determine whether a racketeering injury occurred.

Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980)[18] and the District Court in this case.

> The *Bankers Trust* Court stated:
>
> If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury.

741 F.2d at 517. That reasoning is incorrect because causation analysis is not applicable to the "pattern" requirement of RICO.

Statutes that create rights of action generally contain requirements of two different kinds of elements. One is the proscribed conduct which causes the expected harm; the other requirements represent the legislature's desire to set the boundaries of the statute's application. For causation purposes, the latter are irrelevant. For example, The Civil Rights Act of 1964 requires proof that the employer has at least 15 employees. 42 U.S.C. § 2000e(b). A Title VII plaintiff must survive a but-for test regarding the employer's discrimination, but the plaintiff need not prove he would have suffered no harm had there been only 14 or less employees. Discriminatory refusal to hire, like the predicate acts in RICO, is the harm-causing event while the 15 employee limitation, like the "pattern" provision in RICO, merely reflects Congress' desires to give the statute less than universal application.

Even in the absence of guidance from Congress, the courts look to (1) the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, whether the injury alleged was the form of injury about which Congress was likely to have been concerned. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 478 (1982). Since RICO unambigously aims at the deleterious effects of the

[18] *North Barrington* was authored by the District Judge in this case.

offenses Congress deemed typical of organized crime (pp. 23-26, *post*), there is no occasion to look farther in order to identify the particular element of the Act to which a but-for test applies.

Using arson as an example, it is arson that Congress envisioned as causing harm, not a pattern of arsons. It was certainly known by Congress that an arson victim's harm is no different when the injury results from the arsonist's first offense than the arsonist's second offense. The pattern requirement was inserted in RICO to identify criminal activities typical of organized crime.[19] That requirement focuses on the criminal and his conduct, not the plaintiff or the nature of his harm. *Bankers Trust,* 741 F.2d at 522 (n.1) (Cardamone, J., dissenting). The significance of the pattern in RICO is that the defendant's activities thereby qualify for the punitive and remedial treatment prescribed by Congress.[20]

Of course, it is not enough for a plaintiff to survive a but-for test; he must also satisfy the other aspects of proximate cause. He is required to show either a direct connection

[19] "The term 'pattern' indicates that what is intended to be proscribed is not a single, isolated act of 'racketeering activity' . . . ." Dep. Att'y Gen. Aug. 11, 1969 ltr. to Sen. McClellan, S. Rep. No. 617, 91st Cong., 1st Sess., 122 (1969).

"The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity." S. Rep. No. 617, 91st Cong., 1st Sess., 158 (1969).

[20] *Bankers Trust* is incorrect in another respect. In both of the hypothetical examples (*Bankers Trust,* 741 F.2d at 517), the court assumed that the pattern requirement restricts recoveries to persons themselves injured enough times to comprise a pattern. Under that but-for test, a court deciding whether a pattern exists must ignore all offenses except those committed against the plaintiff. Obviously, Congress did not intend to restrict recovery to those persons who have each suffered harm from murder or kidnapping more than once.

between the criminal act and his injury or that he was the intended victim. Thus a victim's supplier cannot recover damages for losing a customer because, being neither a target nor a direct victim, he is a mere bystander.

Courts employing the "something more" doctrine typically cite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), because that case turned on the analogous "by reason of" provision in Section 4 of the Clayton Act. Courts and commentators taking the opposite side frequently argue that Congress, at the urging of the American Bar Association, passed RICO as a separate statute rather than include it in the Sherman Act, in order to avoid the strict standing, proximate cause, and target-area doctrines which have evolved under the antitrust laws.

In *Brunswick,* plaintiff sought to recover for sales lost to defendant, where defendant's presence in the market was made possible by its alleged violation of Section 7 of the Clayton Act. This Court held that it was not enough for a plaintiff to show merely a but-for connection between defendant's violation of Section 7 and plaintiff's injury:

> [A plaintiff must] prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the *antitrust* laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'

429 U.S. at 489. *Brunswick* holds in a familiar way that civil recovery requires more than demonstrating merely that but for the violation the plaintiff would not have been harmed. *Brunswick*'s analysis of the "type of loss" focused not on the injury but the manner in which it occurred—the connection between the violation and the injury. The kind of harm alleged in

Brunswick was not within the class of injuries Section 7 was intended to forestall, 429 U.S. at 487-488 (e.g., losses caused by predatory selling). The injury in *Burnswick* was fortuitous vis-a-vis the defendant's violation because the plaintiff was only a bystander.

The concern about putting RICO into the Sherman Act, presumably shared by Congress in accepting the advice of the American Bar Association, was two-fold: (1) commingling the two might have an undesirable impact on the antitrust laws and (2) it might pose inappropriate and unnecessary obstacles to RICO plaintiffs.[21] *Brunswick*'s denial of recovery for fortuitous injuries logically applies to virtually all statutory recoveries, RICO included. But *Brunswick* had no occasion to identify the elements of a statute that require proof of causational links and segregate those elements from the other requirements in the statute.

The "by reason of" requirement of Section 1964 means no more than it usually means: the plaintiff must be within the class of persons protected by the statute and the plaintiff's injury must be of the kind which the statute intended to forestall. As stated by the Seventh Circuit:

> As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs .... This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straight-

[21] *Hearings on S.30, Subcommittee No. 5 of House Comm. on the Judiciary,* 91st Cong., 2d Sess., 147-49 (1970). While the ABA report mentioned proximate cause as an example, it is doubtful that either the ABA or Congress intended to do away entirely with proximate cause as a requisite element of recovery—merely that the standing to sue and proximate cause requirements as evolved under the antitrust laws are too strict for RICO. Of course, if that is what was intended, the holdings of *Bankers Trust* and the District Court in this case require even less comment than is afforded here.

> forward reading of the statute as Congress intended it to be read.[22]

(*Haroco*, App., 28)

As *Turkette* teaches, Congress' declared aim was to provide enhanced sanctions and new remedies "to deal with the unlawful activities of those engaged in organized crime". *Turkette,* 452 U.S. at 589. The "unlawful activities" are precisely the predicate acts described in Section 1961(1).

In rejecting the District Court's rationale, the Seventh Circuit aptly noted that those courts espousing "RICO-injury" and "something-more" requirements engaged in nothing more than an attempt to renew an earlier fashioned "organized crime" requirement. (*Haroco*, App., 20, 21) That now obsolete doctrine is worthy of exploration because it shares with the District Court the view that RICO should apply only where the defendant was involved in organized crime.[23]

C. RICO Is Not Limited To Offenses Committed By Organized Crime

In response to early RICO civil suits, some courts reasoned that Congress' underlying purpose of attacking organized crime (and the very title of Chapter IX) justified restriction of RICO's application to organized crime. *See, e.g., Adair,* 526 F. Supp. at 746-47. Congress' concern with organized crime was the underlying reason for the enactment of RICO. *Turkette,* 452 U.S. at 589. But Congress did not (and could not) confine its application to organized crime.[24]

[22] Petitioners now concede that they "do not quarrel with this proximate cause analysis". (Petrs. Brf., 12)

[23] *See, e.g., Barr v. WUI/TAS, Inc.,* 66 F.R.D. 109 (S.D.N.Y. 1975); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.,* 527 F. Supp. 256 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.,* 526 F. Supp. 736 (N.D. Ill. 1981).

[24] That Congress "wanted to but couldn't" is not obvious. Presumably most members of Congress espouse Constitutional prin-

(Footnote continued on following page.)

The scope intended by a statute need not be as narrow as the underlying policy considerations that first prompted Congress to act. As enacted, RICO's intended coverage was broader than organized crime. As Senator McClellan pointed out, the Constitution applies to everyone, including those engaged in organized crime. 116 Cong. Rec. 18,914 (1970).

At least three reasons impelled Congress to draft RICO more broadly than merely to embrace organized crime. First, Congress considered and explicitly rejected the attempts to create a "status offense", on Constitutional grounds. For example, when Rep. Biaggi proposed an amendment that would criminalize membership in the "Mafia" or "La Cosa Nostra", it was pointed out that such an amendment would violate Constitutional principles and contravene this Court's rulings striking down statutes that created status offenses or outlawed membership in certain organizations.[25] *See, Bennett v. Berg,* 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd en banc,* 710 F.2d 1361, *cert. denied,* 104 S.Ct. 527 (1983). *In re Catanella,* 583 F. Supp. 1388, 1428-9 (E.D. Pa. 1984); Note, *Civil Rico:*

(Footnote continued from preceding page.)

ciples as much because of their own belief in them as for obedience to the Constitution and this Court. As stated by Congressman McClory (a member of the House Subcommittee considering S. 30):

> Precedents as contained in numerous court decisions were reviewed and weighed—and every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with *all* who might be affected by this legislation—whether part of the crime syndicate or not.

116 Cong. Rec. 35,204 (1970) (emphasis added).

[25] *See* Statement of Rep. Poff, citing *Robinson v. California,* 370 U.S. 660 (1962), *Scales v. United States,* 367 U.S. 203 (1961), and *Lanzetta v. New Jersey,* 306 U.S. 451 (1939). 116 Cong. Rec. 35,344 (1970). *See also* Statement of Rep. Celler, 116 Cong. Rec. 35,343-44 (1970).

The Temptation and Impropriety of Judicial Restriction, 95 Harv. L.R. 1101, 1107-8 (1982); D. Moran, *Pleading a Civil Rico Action Under Section 1962(c)* [*etc.*], 57 Temple L.R. 731, 748 (n.79) (1984).

Second, Congress found it difficult, if not impossible, to define "organized crime" with any precision. As stated by Rep. Poff:

> [I]t is probably impossible precisely and definitively to define organized crime. 116 Cong. Rec. 35,204 (1970)
>
> * * *
>
> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances. 116 Cong. Rec. 35,344 (1970).

The elusive character of the phrase "organized crime" was one of the reasons for RICO's breadth. *See, Schacht v. Brown* 711 F.2d at 1354-5; *In re Catanella,* 583 F. Supp. at 1429.

Third, RICO was liberally drafted so that its potency would not be reduced by difficult or impossible burdens. Note, 95 Harv. L. Rev., *supra* at 1108-9; Moran, 57 Temple L. Rev., *supra* at 748. An important part of the motivation for RICO's passage was Congress' frustration at the ease with which organized crime escapes punishment.[26]

Courts have frequently observed that a requirement of demonstrating affiliation with organized crime would emascu-

[26] *See, e.g.,* Statement of Sen. McClellan (organized criminals able to "insulate" themselves) 116 Cong. Rec. 586 (1970); Statement of Sen. Hruska (difficulties in proving link between criminal group members and illicit activities they sponsor). (*Id.* at 601).

late RICO's provisions.[27] In construing the Travel Act, the Ninth Circuit made the following statement, which is fully applicable in the present context:

> It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals in [the year] 1961; and, in any event, such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking.

United States v. Roselli, 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971).

Thus, one of the reasons why Congress drafted the statute's provisions broadly was to ensure that difficult proof requirements would not thwart the objectives of RICO:

> ... Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety fraud actionable in federal treble damages proceedings—the price of eliminating all possible loopholes.

Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984).

Congress was well aware that in order effectively to reach "organized crime", RICO would necessarily cover other offenders. As stated by Senator McClellan:

> The Senate Report does not claim, however, that the listed offenses are committed primarily by members of organized

[27] *See, e.g., In re Catanella,* 583 F. Supp. at 1429 (n.60); *Kimmel v. Peterson,* 565 F. Supp. 476, 492 (E.D. Pa. 1983); *Hanna Mining Co. v. Norcen Energy Resources Ltd.,* 1982 Fed. Sec. L. Rep. (CCH), ¶98,742 at 93,736-7 (N.D. Oh. 1982); *U.S. v. Chovanec,* 467 F. Supp. 41, 45 (S.D.N.Y. 1979).

> crime, only that those offenses are characteristic of organized crime ... It is impossible to draw an effective statute which reaches most of the commercial activities or organized crime, yet does not include offenses commonly committed by persons outside organized crime as well. 116 Cong. Rec. 18,940 (1970).

Accordingly, Congress drafted the statute so as to embrace conduct *typical* of organized crime, thereby cutting a "deliberately broad swath" which embraced persons beyond the pale of organized crime.[28] *Schacht v. Brown,* 711 F.2d at 1353.

Thus, Section 1961(1) identified those *offenses* Congress thought to be typical of organized crime. Similarly, since organized crime typically engages in repetitious criminality, Section 1961(5) requires a *pattern* of multiple acts. As thus crafted, RICO applies to all persons whose conduct fits those criteria. The district court decisions restricting civil RICO to cases involving organized crime were overwhelmingly rejected by every Court of Appeals and most district courts faced with that argument.[29]

D. The District Court's Decision Would Stultify Congress' Purpose Underlying The Private Damage Remedy

Congress' grant of private rights of action, especially considering the treble damage and attorney's fees provisions, reflects Congress' desire to enlist the resources of private litigants to enforce the Act. *Cf. Illinois Brick Co. v. Illinois,* 431 U.S. 720, 745-6 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-131 (1969); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 494 (1968). Speaking to the amendment adding a private damage remedy, Senator McClellan urged that it would provide "a major new tool". 116 Cong. Rec. 25,190 (1970).

[28] As Petitioners concede, Congress intended RICO to cover "commercial fraud". (Ptrs' Br., 11)

[29] *See* cases collected in *Haroco,* at App., 13.

This Court's view of the "by reason of" provision in Section 4 of the Clayton Act is that:

> Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations .... [citations omitted]

Blue Shield, 457 U.S. at 472. The direct victims of RICO's predicate acts are the potential plaintiffs upon whom civil enforcement depends, *viz.* "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest". *Assoc. General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 542 (1983). The District Court's decision would destroy the central mechanism on which the private enforcement scheme of RICO depends.

E. The Seventh Circuit's Decision Was Correct

Those courts requiring an "organized crime" nexus, "competitive injury", "distinct RICO injury" or "racketeering injury", ran afoul of not only the "plain meaning" rule of statutory interpretation, *Turkette,* 452 U.S. at 580; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); they went against the grain of the Constitutional scheme of separation of powers. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-5 (1978); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625-26 (1978).

The wide scope of RICO's provisions for civil damage recovery, with its consequent propensity to add "garden-variety" cases to the burdens of the federal courts, was undoubtedly the reason for the incorrectly restrictive decisions of the District Court here and those noted above. But RICO, as written, is broad, not ambiguous (*Haroco,* App., 28) and RICO is deliberately broad. *Schacht,* 711 F.2d at 1353. Congress was fully aware of and intended that it was entering a new domain of federal involvement. *Turkette,* 452 U.S. at 586-7.

In *Reiter v. Sonotone Corp.,* 442 U.S. 330, 344 (1979), this Court stated:

> Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it.

That view is poignantly applicable to RICO.

Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. *United States v. Rogers,* ____ U.S. ____, 104 S. Ct. 1942, 1948 (1984). Courts have no authority to substitute their views for those expressed by Congress in a fully enacted statute. *Tennessee Valley Authority v. Hill,* 437 U.S. at 194-5. As Petitioners note, Senator Thurmond has announced his intention to conduct hearings on whether RICO should be amended. (Petrs. Brf., 9, n.6) That is where such matters must be decided.

The Seventh Circuit correctly rejected the District Court's requirement of a distinct RICO injury and the Second Circuit's holding that a but-for analysis is to be applied separately to the "pattern" requirement of the Act. (*Haroco,* App., 25-27) A plaintiff who suffers an injury caused by one or more of the predicate acts is entitled to damages, so long as he is either a target or a direct victim.

The Seventh Circuit's decision was correct.

III

THE ARGUMENTS OF AMERICAN BANKERS ASSOCIATION ARE INCORRECT AND NOT PROPERLY BEFORE THIS COURT

The *amicus curiae* brief of American Bankers Association ("the Association") offers three interpretations of Section 1962(c) not previously discussed herein: (1) a violation occurs only when the pattern is committed "in a fashion one would expect of true racketeers" and "gangsters" (Amicus Brf., 9, 12), (2) a "pattern of racketeering activity" may require more than two predicate acts (*Id.*, p. 10), and (3) there must be separately a person and an enterprise (*Id.*, p.15).

A. A Requirement That The Crimes Be Committed In Typical Gangster Fashion Is Untenable

Congress did not employ the phrase "typical of a gangster" or any other phrase that characterizes organized crime more narrowly than by the words of the statute. RICO's reach having been thus narrowed to Congress' satisfaction, it is not for courts or lawyers to engraft additional qualifying factors.

Had Congress explicitly established the Association's standard, Section 1962(c) would undoubtedly be void on account of vagueness. *See, United States v. Culbert,* 435 U.S. 371, 374 (1978); *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926). Obviously, unconstitutional interpretations by courts are no more permissible than unconstitutional acts of Congress. The Association's argument should be rejected for the additional reason that courts interpret statutes to resolve ambiguities rather than beget them. *Turkette,* 452 U.S. at 587 (n.10).

There is no support either within or outside the statute to support such an interpretation. The legislative history shows that Congress intended RICO to apply to offenses other than those committed in gangland style. This suggestion of the

Association not only engages in the unacceptable process of resuscitating the "organized crime" limitation; it would not even effectively accomplish its obvious purpose. It would ensnare a non-gangster who might seem to act like a "gangster" and yet it would permit escape by a mild mannered gangster.

The Association apparently believes that whether RICO is violated depends on whether the alleged violator is unsavory. It is the other way around.

B. The Number Of Offenses Necessary To Comprise A Pattern Is Not At Issue

The point that the pattern requirement is not necessarily satisfied with two predicate acts may or may not be correct, but the complaint does not rest on only two acts of mail fraud. The complaint alleges eleven instances of fraudulent loans (App. 59-60, ¶¶ 11, 13) and alleges that the fraudulent declarations of fictitiously high prime rates, billings, and collections thereof, occurred on "many occasions". (App. 61, ¶ 18)

C. The Requirement Of A Separate Person And Enterprise Is Not At Issue

The Seventh Circuit took up the question whether the person and the enterprise must be separate entities. (*Haroco,* A-1, 30-38) That issue affected only the portion of Count I alleging that ANB is liable as a person conducting its own affairs. Respondents lost on this point but did not seek *certiorari.*[30] That issue is not before this Court.

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[30] The other aspect of Count I, alleging that ANB is liable as a person conducting the affairs of Heller, remains intact. (*Haroco,* A-37)

CONCLUSION

The interpretations of RICO sought by Petitioners and the American Bankers Association are imaginative efforts to rewrite the statute. Masked in tones of moderation, they urge interpretations of Section 1962(c) that would emasculate the Act and frustrate Congress' central purpose, for both criminal and civil purposes.

The Seventh Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK and TRUST CO. OF CHICAGO, et al.,

Petitioner,

vs.

HAROCO, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE CITIES OF CHICAGO, NEW YORK AND PHILADELPHIA, AMICI CURIAE, SUPPORTING THE POSITION OF RESPONDENTS

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BRIEF FOR THE CITIES OF CHICAGO, NEW YORK AND PHILADELPHIA, AMICI CURIAE, SUPPORTING THE POSITION OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The Cities of Chicago, New York and Philadelphia ("the Cities") submit this brief as *amici curiae* in support of the position of the respondents. The Cities previously submitted a brief as *amici curiae* in support of the position of the petitioners in No. 84-648, *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, which is to be argued together with this case.

These cases involve attempts to narrow the range of cases in which plaintiffs can recover civil damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO") by requiring that plaintiff have suffered a special "racketeering injury" and (in *Sedima*) by requiring that defendants have previously been convicted of the offenses alleged to constitute a "pattern of racketeering activity."

Attempts to narrow the scope of the civil remedy provision of RICO are of special importance to local governments, including the Cities. The Cities have of course the interest of any property owner. They are also charged by local law with the institutional duty of delivering honest and efficient governmental services to their citizens. *See* Constitution of the State of Illinois (1970), Art. VII, §6; New York City Charter §394; City of Philadelphia Home Rule Charter §4-400.

In discharging these duties, the Cities are faced by special problems posed by organized schemes of tax evasion, bribery, and misuse of confidential information. These schemes cause tangible loss to municipalities (as in lost taxes or overpriced contracts) and also intangible harm

through the loss of citizen respect for the processes of government. *See* Note, *Government Corruption and Civil RICO: Providing Compensation for Intangible Losses*, 58 N.Y.U.L. Rev. 1530 (1983). The enormous amount of money administered by City agencies is of course a tempting target[1] for organized criminality; so too is a City's power to grant or withhold building permits, liquor licenses and zoning variances.[2]

Ordinary civil and criminal remedies available to penalize specific criminal acts and compensate victims are often inadequate. As the Court of Appeals pointed out in its opinion in this case, *Haroco, Inc. v. American National Bank and Trust Company of Chicago*, 747 F.2d 384, 399, n.16 (7th Cir. 1984), lawyers and courts are familiar with the fact that the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid

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[1] The 1985 City of Chicago budget (appropriation ordinance) totals more than $1.9 billion dollars. This does not include the budgets of such separate municipal corporations as the Chicago Board of Education, the Chicago Park District, or the Chicago Transit Authority.

[2] Civil RICO cases brought by local governments involve a wide variety of fact situations. See, e.g., *City of New York v. Arnmart Wholesale Beer Distributors, Inc.*, 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983) (eleven beer distributors involved in frauds to evade City's excise and corporation taxes); *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); *City of Chicago v. North Austin Revitalization Corp.*, No. 85 C 9441 (N.D. Ill., filed Jan. 18, 1985) (city attorney using position to allow his corporation to reap excess profits from participation in public housing rehabilitation program); *City of Milwaukee v. Hansen*, Civ. No. 77-246 (E.D. Wis., Jan. 13, 1981) (arsonists found liable for treble the City's cost of fighting fires); *City of Philadelphia v. Modern Transportation, Inc.*, 84 Civ. 2052 (E.D. Pa., settled Feb. 13, 1985) (intricate scheme to defraud City in connection with sludge removal contracts).

claims for a mere fraction of their value. Prosecution of some offenses may not be undertaken simply because prosecutors have finite resources, and the Cities, of course, have no control over decisions to prosecute.[3]

Because the Cities have found the civil RICO provision of such value in combatting organized schemes of corruption,[4] the Cities have a significant interest in the liberal interpretation of the civil RICO provisions to effectuate the purposes of Congress in enacting the statute.

SUMMARY OF ARGUMENT

Attempts to narrow the broad reach of the civil RICO provisions by conditioning a plaintiff's standing to sue on some special injury not only run counter to the plain meaning of the statute, but also run counter to the identifiable purposes of the statute.

Although in some cases the RICO provisions may create a cause of action where none existed before (and certainly create federal jurisdiction in many cases where there was none before), the greatest impact of civil RICO is in its provision of treble damages and attorneys' fees. The treble damages provision makes its impact in two ways:

[3] In Illinois, for example, responsibility for prosecution of state law felonies, including those that qualify as predicate offenses under RICO, is entrusted exclusively to the State's Attorney for each county, Ill. Rev. Stat. (1983) ch. 14, par. 5, or—in the case of federal offenses—to the United States Attorney.

[4] See cases listed in the Cities *amici* brief filed in No. 84-648 at pages 4-7.

it provides for more complete compensation for an injured plaintiff and it makes it less likely that a defendant who has engaged in a "pattern of racketeering activity" can profit from it. And while Congress in enacting RICO may have had some concern with the compensation of victims, both the text of the statute and the legislative history make it clear that Congress' primary concern was with removing the profit from acts of organized criminality.

It is in failing to recognize this primary focus that attempts to engraft special injury requirements run aground. It is not the nature of the injury that fits a case into the purpose of a RICO treble damage action, but the nature of the defendant's behavior. Congress has determined that (for example) conducting an enterprise through a pattern of racketeering activity victimizes both those directly injured and society as a whole. Such behavior should therefore be discouraged, and one effective means of discouraging it is to make it unprofitable.

It is therefore illogical to say, as the Second Circuit said in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 517 (1984), that a person whose building is burned down by an arson for profit ring has not received a RICO injury unless his insurance is cancelled and his building burns again. This consideration bears no relationship to the acts of the defendant, who, in the hypothetical, probably has no interest at all in the status of plaintiff's insurance coverage.

It is also true that in many, perhaps most, cases a plaintiff apparently injured only by a single "predicate act" would in fact not have been injured if that act were not part of a pattern. That was true on the facts of *Bankers' Trust* itself; the frivolous lawsuits and bribery of the judge had no purpose except to cover up and preserve the pro-

fits of the bankruptcy frauds. This is not, however, a determination to be made on a case-by-case basis. Rather, it is a determination already implicitly made by Congress when it defined "pattern of racketeering activity" in the statute itself.

Consideration of the civil RICO provisions primarily from the point of view of their effect on the defendant is of course of particular interest to local governments, as plaintiffs, because of their concurrent interest in not only obtaining compensation but also deterring corrupt behavior, to the benefit both of the local government and its citizens.

ARGUMENT

This case and No. 84-648, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, together squarely present the question of who is entitled to bring a private treble damage action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968.

The plaintiffs contend, with the agreement of the Court of Appeals for the Seventh Circuit, that it is sufficient for a plaintiff to show that it was injured by an "act of racketeering" that constitutes part of a "pattern of racketeering activity" that has in turn been used in one of the ways forbidden by the Act.

Defendants, supported by the holdings of the Second Circuit, contend that a plaintiff must show something more, an injury that flows not from the predicate act, but

from the pattern itself—and perhaps also from the use of the pattern in the way specifically forbidden.

The answer to this standing question of course, lies in the intent of Congress, and one clue to Congress' intent may be found in considering the purposes for which the Act was passed. *Russello v. United States*, ____ U.S. ____, 104 S.Ct. 296, 78 L.Ed.2d 17, 26 (1983). In particular, it may be useful to look at the private civil remedy provision not from the point of view of its effect on the plaintiff, but rather from the point of view of its effect on the defendant.

Congress set forth its purpose in enacting the RICO statute in §1 of Pub. L. 91-452, 84 Stat. 922, 923 (1970). Congress declared:

> It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

The importance of this statement to the proper interpretation of the Act has been recognized by this Court. *Russello v. United States*, ____ U.S. ____, ____, 104 S.Ct. 296, 78 L.Ed.2d 17, 26 (1983).

One of the new strategies embodied in RICO was an emphasis on attacking the economic basis of organized crime and criminality. The Senate Report stated:

> "What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, *an attack must be made on their source of*

economic power itself, and the attack must take place on all available fronts." S. Rep. No. 91-617 p. 79 (1969) (Emphasis added).

The enlistment of private plaintiffs in the enforcement of RICO is not without precedent. To some extent, §1964(c), the section providing for a private right of action for treble damages and attorney's fees, was modeled on section 4 of the Clayton Act, 15 U.S.C. §15,[5] and adopted the potent antitrust remedies of treble damages and attorney's fees as a means of assuring RICO's effectiveness.[6]

The private treble damage action originated in the Sherman Act and served the dual purposes of enforcing the law and providing more adequate compensation for victims. The origin of this remedy was set forth by this

---

[5] The relation of the two sections does not however, imply that it is proper to import into the RICO statute the kinds of special standing requirements that are sometimes found appropriate in the antitrust context. (See, e.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).) The difference in purpose between the antitrust laws (to encourage competition and an efficient economy) and RICO (to eliminate organized criminality and racketeering) decisively differentiate the two sections. See, e.g., the discussion in *Furman v. Cirrito*, 741 F.2d 524, 531-532 (1984) and Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1111-1113 (1982).

[6] The relevant legislative history is effectively summarized in Tannenbaum and Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

Court in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, 97 S.Ct. 690, 50 L.Ed.2d 701, 710, n.10 (1977):

> 10. Treble-damages antitrust actions were first authorized by §7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals." especially consumers, 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. Id., at 2456 (Sen. Sherman).

When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H.R. Rep. No. 627, 63d Cong. 2d Sess., 14 (1914). The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see e.g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. The House debates following the conference committee report, however, indicate that the sponsors or the bill also saw treble-damages suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though

the bill was attacked as lacking meaningful sanctions, e.g., id., at 15818-15821 (Sen. Reed), 16042-16046 (Sen. Norris).

Private enforcement of the antitrust laws [and, by extension,] of RICO provides an important supplement to the limited enforcement resources of the Department of Justice. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), this court held that a corporation can be held liable for antitrust violations arising from the acts of its agents acting with *apparent* authority. The court reasoned that this rule is consistent with the congressional intent to encourage competition, because the threat of civil damages will provide corporations with a powerful incentive to control the actions of its agents.

Conversely, attempts by courts to narrow the availability of the private treble damage action under RICO run counter to the congressional purpose of eliminating organized criminality and racketeering by, among other things, taking the profit out of it. This is true whether the narrowing is accomplished by manipulating standing requirements or by engrafting new elements into the statute such as that the defendant be a "mobster" or a "racketeer."[7] (See, e.g., *Barr v. WUI/TAS, Inc.*, 60 F.R.D. 109 (S.D.N.Y. 1975).)

[7] Actually, it seems somewhat incongruous to hear a defendant argue that it should not be subject to a civil action under RICO because it is not a "racketeer" but a respectable business that just

(Footnote continued on following page)

Efficient private enforcement of RICO requires that all persons actually harmed by the existence of a violation of §1962 of the Act—whether the direct cause of their injury is the "pattern" of racketeering activity or one or more of the predicate acts—be drafted into the congressionally mandated war on organized criminality.

CONCLUSION

In *Crocker National Bank v. Rockwell International Corporation*, 555 F. Supp. 47, 49-50 (N.D. Cal. 1982), the court stated:

> "The key purpose of RICO's civil remedy is to divest the association of the fruits of its ill-gotten gains . . . . This purpose would be severely undermined if persons who suffered direct harm from racketeering activity . . . could not recover in the absence of a showing of some 'special' harm . . . . Such a rule would leave money derived from actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators."

RICO's purpose focuses not on the nature of the harm to the individual victim, but on the social harm caused

[7] *continued*
happens to have engaged in a pattern of mail or bankruptcy fraud, or perhaps bribery of public officials. A defendant innocent of the predicate acts can, of course, defend itself on that basis. And the *in terrorem* effect of the treble damage action is, if not exaggerated in the first place, counterbalanced by the general difficulty of plaintiffs in recovering damages in a reasonable time and at reasonable cost. *Haroco, Inc. v. American National Bank and Trust*, 747 F.2d 384, 399, n.16 (7th Cir. 1984).

by the nature of the defendant's conduct. This purpose must not be undermined by a narrow reading of a statute that Congress has commanded be read liberally to effectuate its purpose. Pub. L. 91-452, section 904(a), 84 Stat. 947. The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

OBJECTION TO MOTION OF THE INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Respondents.

OBJECTION TO MOTION OF THE INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 36.3 Petitioners hereby object to the Motion For Leave To File Amicus Curiae Brief by The Interinsurance Exchange Of The Automobile Club Of Southern California for the following reasons:

1. The interest of movant Interinsurance Exchange of The Automobile Club Of Southern California as disclosed in its Motion appears to be simply that of an association

which represents party litigants in civil RICO actions involving insurance claims for which they hope to recover treble damages. Furthermore, the movant has failed to disclose its identity in that it does not state whether it is a corporation, a voluntary association or some other entity, nor does it identify its members and/or shareholders.

2. Movant's interest is therefore no different than that of every other potential civil RICO plaintiff and it has suggested no reason why Respondents in this case cannot adequately represent its interest. In addition, amicus curiae briefs in support of Respondents' position have been filed on behalf of: (1) the States of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming; (2) the Cities of Chicago, New York and Philadelphia; and (3) County of Suffolk, New York.

3. Unlike the amicus curiae brief filed by the American Bankers Association in support of Petitioners, the movant's sole interest is its members' stake in potential or pending RICO suits. In contrast, the American Bankers Association is the largest national trade association of the commercial banking industry in the United States, representing banks which are both plaintiffs and defendants in civil RICO actions.

4. The Brief which movant seeks to file raises arguments not pressed by Petitioners or Respondents and as such are not appropriate for consideration nor should Petitioners be required to respond thereto especially in light of the other amici briefs which have been filed in this action. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464, 1469-70 n.7 (1984); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

WHEREFORE, Petitioners respectfully submit that the Motion For Leave To File Amicus Curiae Brief by The Interinsurance Exchange Of The Automobile Club Of Southern California should be denied.

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HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

OBJECTION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY JOHN GRADO

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OCTOBER TERM, 1984

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Respondents.

OBJECTION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY JOHN GRADO

Pursuant to Supreme Court Rule 36.3 Petitioners hereby object to the Motion For Leave To File Amicus Curiae Brief by John Grado, on behalf of himself and Technographics, Inc. for the following reasons:

1. The interest of movant John Grado as disclosed in his motion is simply that of an individual litigant who has a civil RICO action pending in which he hopes to recover treble damages. Furthermore, the movant fails to disclose in his motion that his action was appealed pursuant to

28 U.S.C. §1292(b), to the United States Court of Appeals for the First Circuit, *Grado v. Gross, et al.*, No. 84-1888, on the same issue that is presented in this case. However, after oral argument was heard and after certiorari was granted in this case and in *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, No. 84-648, the First Circuit dismissed the appeal since this Court's resolution of the issue will be dispositive. A copy of the First Circuit's Order is reprinted in the attached Appendix.

2. Movant's interest is therefore no different than that of every other civil RICO plaintiff with a pending action and he has suggested no reason why Respondents in this case cannot adequately represent his interest. In addition, amicus curiae briefs in support of Respondents' position have been filed on behalf of: (1) the States of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming; (2) the Cities of Chicago, New York and Philadelphia; and (3) County of Suffolk, New York.

3. Unlike the amicus curiae brief filed by the American Bankers Association in support of Petitioners, the movant's sole interest is his individual stake in his pending RICO suit. In contrast, the American Bankers Association is the largest national trade association of the commercial banking industry in the United States, representing banks which are both plaintiffs and defendants in civil RICO actions.

4. The Brief which movant seeks to file raises arguments not pressed by Petitioners or Respondents and as such are not appropriate for consideration nor should Petitioners be required to respond thereto especially in light of the other amici briefs which have been filed in this action. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464, 1469-70 n.7 (1984); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

WHEREFORE, Petitioners respectfully submit that the Motion For Leave To File Amicus Curiae Brief by John Grado should be denied.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1888

JOHN GRADO, on behalf of himself and Technographics, Inc.,
Respondent, Appellee,

v.

HENRY GROSS, MAHIR A. REISS, DAVID ALLEN, GARDNER, REALEX CAPITAL ASSOCIATES, L.P., AND THE REALEX CAPITAL CORPORATION,
Petitioners, Appellants,

and

TECHNOGRAPHICS, INC.,
Nominal Defendant, Appellee.

ORDER OF COURT

Entered: March 22, 1985

In accordance with this court's opinion filed this day.

It is ordered that this Court's order of October 22, 1984 partially granting petitioner's request for permission to appeal pursuant to 28 U.S.C. § 1292 (b) is vacated.

No costs.

By the Court:

/s/ Francis P. Scigliano
Clerk.

[Cert. cc: Clerk, U.S.D.C. of Massachusetts]

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1888

JOHN GRADO, ON BEHALF OF HIMSELF
and TECHNOGRAPHICS, INC.,

Respondent, Appellee,

v.

HENRY GROSS, MAHIR A. REISS, DAVID ALLEN,
GARDNER, REALEX CAPITAL ASSOCIATES, L.P., and
THE REALEX CAPITAL CORPORATION,

Petitioners, Appellants,

and

TECHNOGRAPHICS, INC.,

Nominal Defendant, Appellee.

Appeal from the United States District Court
for the District of Massachusetts
[Hon. A. David Mazzone, *U.S. District Judge*]

Before

Torruella, Aldrich, *Circuit Judges,*
and Selya,* *District Judge.*

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* Of the District of Rhode Island, sitting by designation.

John E. Beerbower with whom *Sheryl E. Reich, James E. Brandt, Richard M. Breslow* and *Cravath, Swaine & Moore* were on brief for appellants.

Allen C.B. Horsley with whom *Gene K. Landy, Christine M. Roach,* and *Widett, Slater & Goldman, P.C.* were on brief for appellee.

March 22, 1985

TORRUELLA, *Circuit Judge.* On October 22, 1984, we granted petitioner's request for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), to review that portion of the district court's order relating to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1691 *et seq.* Since that time, the Supreme Court has granted certiorari to review a case involving the very same issue that we were to consider. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 105 S. Ct. 901 (1985). In view of this development, and that any decision by this court of the issue now before the Supreme Court might very well be unnecessary, we think it appropriate to revoke our grant of jurisdiction and to allow the case to continue below.

It is so ordered.

No. 84-822

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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO et al.,

Petitioners,

v.

HAROCO, INC. et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Interest of *Amicus Curiae*

The Attorney General of the State of New York submits this *amicus* brief in support of Respondents Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co. (together referred to as "Haroco"). In submitting this brief, New York State incorporates by reference the "Interest of Amicus Curiae" statement set forth in its brief in *Sedima, S.P.R.L.* v. *Imrex Company, Inc.*, No. 84-648, filed on February 28, 1985. In asserting these interests, we again aver that curtailing the scope and applicability of civil RICO, 18 U.S.C. §1964(c), as suggested by petitioners and *amicus*, the American Bankers Association ("ABA"), would seriously undermine the ability of the State and its citizens to obtain full redress for injury caused by RICO violations and would virtually eliminate RICO's effectiveness in rendering crime unprofitable.

We hereby adopt the reasoning and conclusions advanced in support of Respondents in the *amicus* brief submitted by the Attorney General of the State of Arizona and thirty-two sister states and offer additional grounds in support thereof.

Statement

We respectfully refer the Court to Respondent's brief for a statement of the factual background and legal proceedings below.

Petitioners American National Bank and Trust Company of Chicago, Walter E. Heller International Corp. and Ronald J. Grayheck ("ANB," "Heller International" and "Grayheck") raise the question whether civil RICO plaintiffs may recover treble damages, pursuant to 18 U.S.C. §1964(c), for injury caused only by the racketeering activity specified in 18 U.S.C. §1961 or whether plaintiffs must also demonstrate that such injury resulted from defendant's "use" of and engagement in those racketeering activities by acquiring, operating or maintaining an interest in, or conducting, or participating in the conduct of, an interstate or international enterprise.[1]

Summary of Argument

Petitioners correctly assert that a RICO injury requires proof of a pattern of racketeering activity plus the use of that pattern to acquire, maintain or conduct an enterprise's affairs. This formulation adheres to the plain meaning of civil RICO, 18 U.S.C. §1964(c), and gives meaning and effect to all of the statutory language. We submit that the Seventh Circuit did, in fact, consider both these parts of §1962 in its examination of RICO injury, and did not base recovery under §1964(c) on injury from the predicate acts alone.

1. In its *amicus* brief, the American Bankers Association raises a separate question, discussed by the court below, but not addressed herein by petitioners, *i.e.*, whether a single entity can be both the "person" who commits the racketeering acts and the enterprise which the person is "employed by" or "associated with" under §1962. We respond to this issue in Part C of our brief. Amicus suggests that RICO should be interpreted to apply to activities "characteristic of organized crime," a contention we address in Part B herein.

The core of petitioners' brief, however, addresses the nature of the relationship intended by the phrases "employed by" and "associated with" in §1962(c). Petitioners wrongly assert that §1962(c)[r] gives rise to civil liability only where defendants dominate or manage the affairs of the enterprise or where the proscribed pattern of racketeering activity is an integral part of the enterprise's affairs. This interpretation of §1962(c) ignores the statutory language rendering defendants answerable where they "conduct, or *participate, directly or indirectly,* in the conduct of [an] enterprise's affairs through a pattern of racketeering activity . . ." and severely undercuts RICO's effectiveness.

In its *amicus* brief, the ABA goes astray by asserting that the courts should focus not on the question of injury but on whether the alleged misconduct is "characteristic of organized crime"—a determination already incorporated in the statute by the very selection of the proscribed racketeering activities set out in §1961. *Amicus* also errs in its suggestion that parent and wholly-owned subsidiary corporations cannot be held liable for §1964(c) injury because their unity of interest makes them both the "person" which commits the conduct proscribed by §1962(c) and the "enterprise" whose affairs are conducted thereby. We submit that when enterprises such as corporations are the instrumentality of the pattern of racketeering, their agents are the statutory persons, and the corporations may be held liable under the doctrine of *respondeat superior.*

ARGUMENT

A. RICO Injury Is Injury Proximately Caused by a Violation of §1962

Taking as axiomatic the precept that expansion or restriction of a statutory enactment is the province of Congress, not the courts, petitioners assert that the type of injury RICO was intended to redress may easily be discerned from the plain meaning of 18 U.S.C. §1964(c) ("civil RICO"). (Brief at 9) Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fees.

In its decision below, the Seventh Circuit held that "this 'by reason of' language . . . simply imposes a proximate cause requirement on plaintiffs." *Haroco, Inc.*, v. *American National Bank and Trust Co.*, 747 F.2d 384, 398 (1984). Petitioners concurred with the Seventh Circuit's proximate cause analysis (Brief at 12, 28-29)[2] and we agree that it is

2. Petitioners reject the Second Circuit's analyses in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482, (1984), *petition for cert. granted*, Jan. 15, 1985, and *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (1984), *petition for cert. filed*, Oct. 24, 1984, which requires a "distinct" or "different" injury, stating

> Section 1964 does not, however, necessarily demand that the injury be different from an injury suffered by the underlying predicate acts. . . . Thus, if the RICO violation is established and it is determined that the plaintiff was injured by reason of the violation, a court need not draw a finer line and differentiate between the injuries caused by the underlying acts and those caused by the Section 1962 violation.

(Brief at 29, footnote omitted)

sound. But petitioners objected that "The [Seventh Circuit's] analysis fell short . . . because it misapprehended what constitutes 'criminal conduct in violation of Section 1962' (Brief at 12), pointing out that such violation requires the commission of a pattern of racketeering activity *and* "a particular use of the pattern in connection with an enterprise." (*Id.* at 12-14). Petitioners contended that the Seventh Circuit had dropped the "use" element from its analysis, thereby reducing the §1962 violation to a §1961 violation and equating injury from the §1962 violation to injury from the predicate acts alone.

We agree with petitioners that a §1962 violation is committed by the proscribed racketeering activity *and* the use of that activity as set out in §1962. Indeed, we assert that the Seventh Circuit had articulated the very test propounded by petitioners in setting forth the elements of a section 1962(c) violation. The *Haroco* court stated:

> To allege a violation of section 1962(c), the plaintiff must allege that the defendant (1) was employed by or associated with (2) an enterprise engaged in, or the activities of which affected, interstate, or foreign commerce, and (3) that the person conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity.

747 F.2d at 387. Having established these factors as elements of a §1962 violation, the *Haroco* court then went on to reject the argument in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, October 24, 1984, that each element of the RICO violation must be a "but-for" cause of a civil RICO plaintiff's injury. *Haroco* rejected the *Bankers Trust* analysis because it

applied the but-for rule in a manner that eliminated recovery for injury caused by the predicate acts even where the pattern of racketeering activity actually affected the enterprise's affairs and all other elements of §1962 were met, and restored the primary purpose of the RICO statute and of RICO treble damage recoveries, holding:

> We conclude that a civil RICO plaintiff need not allege or prove injury beyond any injury to business or property resulting from the underlying acts of racketeering. Plaintiff's allegations of injury in this case —excessive interest charges resulting from defendants' alleged fraudulent scheme to overstate the prime rate—satisfy the requirements of 18 U.S.C. §1964(c).
>
> *This holding by no means renders superfluous the requirement in section 1964(c) that the plaintiff be injured "by reason of" a violation of section 1962.* As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property. . . .

Id. at 398. (Emphasis added) Petitioners' complaint that *Haroco* required only injury by reason of the predicate acts ignored *Haroco's* clear statement of the §1962 violation and misperceived *Haroco's* real concern—that recovery for predicate act injury not be precluded by *Bankers Trust's* erroneous application of the *but-for* causation test.

In the guise of attacking *Haroco* for its purported failure to include the "use" aspect of §1962 in its proximate cause analysis, petitioners slipped in an argument not directly raised in their petition for *certiorari,* but of critical importance in RICO cases, *viz.,* that §1962(c) is violated only where a defendant's use of the pattern of racketeering activity amounts to *control* over the affairs of the enterprise.[3] We assert that this position flies in the face of the plain meaning of §1962(c), and that it fails to distinguish between concepts of *enterprise corruption* articulated in §1962 and theories of *enterprise liability* developed under the common law. (See Part C, *infra*).

Section 1962(c) specifically speaks of the use of the racketeering pattern *directly or indirectly,* and provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, *to conduct* or *participate, directly or indirectly*[4] *in the*

3. Although petitioners raise this argument in the context of civil RICO, it obviously bears the same implications in finding defendants criminally culpable.

4. The plain meanings of the pivotal terms used in §1962(c) are as follows:

> Conduct: 1. to show the way to; lead; guide;
> 2. to manage, control, or direct
>
> Associate: 1. to join together; connect; combine;
> 2. to bring (a person) into relationship with oneself or another as companion, partner, friend etc.
>
> Participate: to have or take a part or share in.
>
> Directly: 1. in a direct way or line; straight;
> 2. without a person or thing coming between; immediately
>
> Indirect: *a*) not straight; deviating; roundabout;
> (*b* not straight to the point, or to the person or thing aimed at [an indirect reply]; . . . *d*) not immediate, secondary [indirect result]
>
> Websters New World Dictionary (2d Coll. ed. 1980)

conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[5]

(Emphasis added). In their attempt to narrow civil RICO by hobbling §1962, petitioners argue that the pattern of racketeering activity must be an "integral part of the enterprise's affairs" carried out by persons who "direct the course of or manage the enterprise's affairs" (Brief at 17-22).[6]

We submit that cases suggesting that §1962 persons must manage or direct the affairs of an enterprise involved situations where the enterprise had been *used as an instrumentality*[7] of the alleged §1962 violation and was,

5. This argument applies equally to §1962(a) and (b) which provide in relevant part:

> (a) It shall be unlawful for any person who has received any income derived, *directly or indirectly,* from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, *directly or indirectly,* any part of such income, or the proceeds of such income, in acquisition of any interest in or the establishment or operation of, any enterprise. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, *directly or indirectly,* any interest in or control of any enterprise . . . .

6. Petitioners justify their two-prong test—predicate acts plus unlawful use of the pattern—by citing *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975) for the proposition that "in expounding a statute, the court must not be guided by a single word or sentence, but by the entire provisions of the law," (Brief at 14), but they immediately abandon this admonition by pointedly ignoring the statutory language proscribing the use of the pattern "to conduct, or *participate, directly or indirectly,* in the conduct of" the enterprise's affairs.

7. In Bennett v. Berg, *The RICO Civil Fraud Action in Context,* 58 Notre Dame L. Rev. 237, 307-25 (1982), Prof. G. Robert Blakey notes that a RICO enterprise may be a "victim, prize, instrument or perpetrator."

therefore, being *sued as a defendant, see, e.g. Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1982) *modified en banc,* 710 F.2d 1361, *cert. denied sub nom., Prudential Ins. Co.* v. *Bennett,* 104 S.Ct. 527 (1983), or where an accused individual contended that the affairs of the enterprise were unaffected by the objectionable conduct, *see, e.g., United States* v. *Mandel,* 591 F.2d 1347 (4th Cir.), *vacated in part on other grounds by an equally divided court,* 602 F.2d 653 (4th Cir.) (en banc) (per curiam), *reh'g denied,* 609 F.2d 1076 (4th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980). We suggest that analysis of enterprise corruption under §1962 involves totally separate concerns from analysis of §1964(c) enterprise liability; that analysis of §1962 should not be constrained by concern for inappropriate imposition of RICO sanctions or remedies; and that a finding of enterprise *corruption* under §1962 does not necessarily require a finding of enterprise *liability* under §1964(c).

The distinction is most obvious where the charged enterprise is a victim and the pattern of racketeering activity benefits the culpable persons to the detriment of the infected enterprise. *See United States* v. *Webster,* 669 F.2d 185 (4th Cir. 1982), *modifying* 639 F.2d 174 (1981). ("The proper question should have been whether the affairs of the [charged enterprise] were conducted through the pattern of racketeering activity, not whether [those affairs] were benefitted or advanced or whether profit to the [enterprise] resulted." 669 F.2d at 186-87).[8]

8. Where the affairs of the enterprise are not affected, or in any way impacted by the pattern of racketeering, there is no §1962 violation. See *United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977), *cert. denied, Helfer* v. *United States,* 435 U.S. 951 (1978) ("The Government's case must fail because of a total want of proof of the connection between the racketeering activities and the affairs of Maple Manor Inc. [the enterprise]. *Id.* at 852.)

Had Congress wished to limit §1962 in the manner petitioners suggest, it would simply have said "conduct, manage or direct such enterprise's affairs." Instead Congress used the phrase, "participate, directly or indirectly." Moreover, Congress chose very broad terms to describe the relationship between the "person" and the "enterprise." Those relational terms—"employed by or associated with"[9]

9. In the seminal case of *United States* v. *Elliott,* 571 F.2d 880, 903 (5th Cir.) *cert. denied,* 439 U.S. 953 (1978), the court explicitly stated:

> The substantive proscriptions of the RICO statute apply to insiders and *outsiders*—those merely "associated with" an enterprise—who participate directly and *indirectly* in the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. §1962(c). Cf. *United States* v. *Forsyth,* 560 F.2d 1127, 1135-36 (3d Cir. 1977). Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.

In *United States* v. *Cauble,* 706 F.2d 1322 (5th Cir. 1983), *cert. denied,* 104 S.Ct. 996 (1984), the court simply asked whether "the predicate acts had some affect on the lawful enterprise." Cases broadly interpreting "associated with" include: *United States* v. *Janotti,* 729 F.2d 213 (3d Cir.), *cert. denied,* 105 S.Ct. 243 (1984) (City Councilman who introduced fictitious shiek to law firm as a potential client was sufficiently "associated with" that firm); *United States* v. *Whitehead,* 618 F.2d 523 (4th Cir. 1980) (prosecuting attorney was sufficiently associated with prostitution ring to which he offered protection); *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980) ("The final element of a RICO violation is proof that the defendant participated in the enterprise through a pattern of racketeering activity. Bright's [owner of a bail bonding agency] sole participation in the enterprise took the form of bribery of [Sheriff] Hamilton. . . . There was sufficient evidence by which a jury could find that Bright participated in the affairs of the Sheriff's office by bribing the Sheriff." *Id.* at 830); *United States* v. *Karas,* 624 F.2d 500 (4th Cir. 1980), *cert. denied,* 449 U.S. 1078 (1981) (outsiders convicted of bribing county law officers); *United States* v. *Lee Stoller Enterprises,* 652 F.2d 1313 (7th Cir.), *cert. denied,* 454 U.S. 1082 (1981) (individual and corporate defendants convicted under 1962(c) scheme of kickbacks to sheriff's office); *United States* v. *Baker,* 617 F.2d 1060 (4th Cir. 1980) (outsider convicted of arranging payment of bribes to sheriff's office); *United States* v. *Herman,* 589 F.2d 1191 (3d Cir.

(footnote continued on next page)

—cannot reasonably be interpreted to refer only to persons who direct an enterprise's affairs.

Moreover, in arguing for a narrow construction of §1962, petitioners ignore Congress' explicit mandate that "the provisions of this title shall be liberally construed to effectuate its remedial purposes," §904(a), Pub. L. 91-452, 84 Stat. 947, acknowledged and adhered to in *United States* v. *Turkette,* 452 U.S. 576 (1981). As this Court explicitly recognized in construing criminal RICO's forfeiture provisions, 18 U.S.C. §1963, Congress deliberately employed general terms in that portion of the statute "apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth," *Russello* v. *United States,* 464 U.S. 16, 104 S.Ct. 296, 300 (1983), specificaly pointing to " 'enterprise' in §1961(4); 'racketeering activity' in §1961(1) (1976 ed. Supp. V); *and 'participate' in §1962(c).*" *Id.* (Emphasis added)

In attempting to avoid the breadth of "participate," expanded by the phrase, "directly or indirectly," petitioners argue that the liberal construction provision applies only to the actual "remedies" of RICO, §§1964 and 1968; that this mandate does *not* apply to §1962 itself; and that

1978), *cert. denied,* 441 U.S. 913 (1979) (upholding conviction of former state court magistrate for bribe receiving from bail agency/enterprise); *United States* v. *Frumento,* 563 F.2d 1083, 1090-91 (3d Cir. 1977), *cert. denied,* 434 U.S. 1072 (1978) (affirming RICO conviction of individual in charge of patronage for a Democratic Committee—enterprise was Pennsylvania's Department of Revenue's Bureau of Cigarette and Beverage Tax.); *United States* v. *Lavin,* 504 F.Supp. 1356, 1359 (N.D. Ill. 1981) ("even those defendants not directly employed by the Board of Appeals (the RICO enterprise) are within the statute since by soliciting and accepting property assessment complaints they were 'associated with' this enterprise"); *State of Maryland* v. *Buzz Berg Wrecking Co.,* 496 F.Supp. 245 (D. Md. 1980) (defendants included corporations and individuals who allegedly bribed director of construction for a city housing department).

such "statutory rules of construction" as RICO's liberal-construction directive "have no relevance when the statutory language is clear." These assertions are meritless. First, by its express terms, the liberal-construction clause applies to *all* the provisions of Title IX. That §1962 defines criminal RICO does not prevent liberal interpretation of its terms.[10] This Court noted, without any reservation as to its appropriateness, that "[s]o far as [it had] been made aware, this is the only substantive federal criminal statute that contains such a directive. . . ." *Russello* v. *United States,* 104 S.Ct. at 302.[11] Secondly, we submit that clear legislative mandates stand on different footing from judicially created rules of statutory construction and require adherence irrespective of the presence of ambiguity or other triggers for statutory construction.

The rule petitioners propose would eliminate recovery except in instances where defendants had achieved substantial domination and control over an enterprise. Until defendants gained that degree of involvement, they could

10. This statutorily mandated liberality need not extend to the racketeering activities themselves, which are made criminal by other statutory provisions.

11. Petitioners apparently misapprehend the "rule of lenity" and incorrectly confuse it with the concept of liberal construction. "The rule of lenity [or "leniency" as petitioners phrase it] which this Court has recognized in certain situations of statutory ambiguity . . . 'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning *as an overriding consideration of being lenient to wrong-doers.*'" *Russello,* 104 S.Ct. at 303. (Emphasis added). It is intended to relieve defendants of an unfair result where some statutory ambiguity provides a less onerous alternative interpretation. (Petitioners concede, that RICO's provisions are not ambiguous. Brief at 10, 12). By contrast, an explicit congressional directive to *interpret* a statute liberally requires that the court take that approach from the beginning to the end of its analysis.

not be made to respond to civil RICO remedies, thus protracting the period during which defendants could victimize enterprises, with impunity. This result is absurd. RICO was designed to ruin *defendants,* not plaintiffs. Moreover, one of its central purposes was to prevent infiltration of legitimate businesses by criminal elements. To require plaintiffs to wait until such infiltration is virtually complete simply make no sense. We submit that a pattern of racketeering activity which corrupts or defrauds an enterprise constitutes the requisite direct or indirect participation in the conduct of that enterprise's affairs, as proscribed by §1962. Defendants should be held liable for RICO treble damages in such instances, irrespective of their stake in the management of the enterprises affairs.[12]

Because governmental entities provide most of their services to citizens through contractual arrangements with "outside" firms and individuals, adherence to the plain

12. Moreover, we submit that there is an important distinction between the concept of domination or management of an enterprise's affairs and the pattern of racketeering activity as an integral part of the enterprise's affairs. Obviously in cases of fraud, the business of the enterprise can be infected although its owners, directors and managers are uninvolved. Its affairs may nonetheless be subjected to fraudulent schemes, and fraud perpetrated by outsiders without the cooperation of insiders may go undetected for years.

Examining the facts of *Haroco,* however, we fail to understand how the conduct of the ANB defendants, in setting interest rates, did not and "could not" form the basis of allegations that those defendants were "directing or managing ANB's business through the overcharges of interest rates tied to prime rates." (Brief at 17) Banks are in the business of making loans and their gross earnings on those loans derive from the difference between the amount they charge customers as interest and the amount they paid for the funds they lend. The *Haroco* complaint appears to allege that an "integral part" of the enterprise's affairs was *directly* affected, an allegation involving far more than the minimal, indirect affect on the enterprise's affairs required by §1962.

meaning of the statute is of paramount importance.[13] There is nothing "incidental" about the pernicious effect that racketeering activity has on governmental enterprises and the citizens they serve and there is no sound policy reason to engraft onto §1964(c) a requirement that restricts RICO recovery to advanced cases of infiltration or corruption. In any event, whether public or private interests are involved, the plain language of §1962, including key terms such as "employed by," "associated with," "participate" and "directly or indirectly" must be given meaning and effect. *Philbrook* v. *Glodgett*. Petitioners' interpretation of these terms limits RICO's effectiveness to instances where defendants thoroughly ensnare an enterprise, sterilize its management, and, in some instances, artificially prolong the life of a company while stripping its assets. This "domination" theory gives racketeers license to do business through predicate offenses, unless and until they succeed in taking over management.

RICO does *not* require that the proscribed conduct permeate or be an integral part of the enterprise before its remedies can be utilized. This Court should not impose such a limitation.

13. In *State of New York* v. *O'Hara*, Civ. No. 83-1440C (W.D. N.Y. 1983), plaintiff sued the former city manager of the City of Niagara Falls, alleging that he had accepted a promise of employment with and other benefits from the company which was then negotiating with the City on a cleanup contract to clean up Love Canal. The contract ultimately cost the City in excess of $6,000,000 (plus $1,528,000 for insurance premiums), of which approximately $1,624,000 were "disallowed" against the terms of the contract under a New York State audit. Plaintiff alleges, *inter alia*, that the contract terms improperly favored the contractor as a result of the City Manager's unlawful conduct and the corporate defendant's fraud, and that the defendants should be held liable for RICO treble damages. This case was dismissed on the authority of *Sedima* and *Bankers Trust Co.*, 595 F.Supp. 1102 (1984).

B. Activity "Characteristic of Organized Crime" Is Incorporated in §1961

In its *amicus* brief, the American Bankers Association raises two points; first, that the courts should analyze RICO *injury* by determining whether the underlying criminal *activity* is "characteristic of organized crime" (*Amicus* Brief at p. 8) and second, that the "person" and "enterprise" cannot be identical under §1962(c). We address these issues, although they do not appear to be raised by the petition herein, because they figure prominantly in RICO litigation and the courts are divided as to their resolution.

The first argument propounded by the ABA tracks *Sedima's* suggestion that RICO was intended to proscribe "mobster"-type activity, 741 F.2d 495-96, and is simply a variation of the "organized crime" requisite which has been rejected by all of the circuit courts which have considered it.[14] More importantly, RICO was structured to incorporate this concept by adopting as §1961 *predicate offenses* those activities which mobsters typically used. During the course of legislative debates, Senator McClellan observed that the predicate offenses "are characteristic of organized crime. [They] lend themselves to organized commercial exploitation. . . ." 16 Cong. Rec. at 18,940. As he explained in a subsequent article, "the Senate report does

14. *Owl Construction Co.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540 (5th Cir.), *cert. denied*, 105 S.Ct. 118 (1984); *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom., Moss* v. *Newman*, 104 S.Ct. 1280 (1984); *Bunker Ramo Corp.* v. *United States Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified en banc*, 710 F.2d 1361, *cert. denied sub nom., Prudential Ins. Co.* v. *Bennett*, 104 S.Ct. 527 (1983).

not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime." McClellan, *The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L. Rev. 55, 142 (1970). The selection principle espoused by the ABA (*Amicus* Brief at 8-9) has, therefore, already been drafted into the statute.

Moreover, the view that "organized crime" accomplishes its goals through "characteristic," and often violent, behavior is outdated. "Organized crime" has been called "America's biggest business," Cook, *The Invisible Enterprise, Forbes,* September 1980, p. 60, and its impact on the economy operates through sophisticated, often covert business transactions rather than obvious and violent criminal conduct. " 'The millions of dollars [organized crime] can throw into the legitimate economic system,' the [President's Commission on Law Enforcement and Administration of Justice] observed, 'give it the power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier for businessmen to continue in business.' That was thirteen years ago, and nothing has changed since." *Id.* at 61.[15] The racketeer as businessman has become part

15. The article continues:

> [M]oney is money, and the mob doesn't care where it makes it. New York's Johnny Dioguardi had a kosher-meat business, a business novelty company and a record store. California's Louis Tom Dragna runs a strictly legitimate gourmet business (Roberta Fashions). . . . Onetime Cleveland mobster Morris B. Dalitz used to run a string of laundries in the Midwest, main-

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of the popular culture. A newspaper article entitled *Mob Crowds Legit Biz* began: "In a dramatic scene from the Godfather II, young Michael Corleone tells associates that in a few years the mob will be totally involved in legitimate business." Daily News, February 24, 1985, p.3, col. 1.

Although there is a wealth of commentary critizing the broad applicability of civil RICO, no one has suggested a device capable of distinguishing those activities "characteristic of organized crime" more accurately than Congress did in setting forth the proscribed racketeering activities in §1961.[16] *Amicus* suggests none, relying instead

> tained a sizable investment portfolio in companies like Detroit Steel and the Rock Island Railroad, and now runs Rancho La Costa, the posh Teamster-financed residential resort on the Pacific. . . . In the East whole towns have been mob controlled for years—Long Branch, NJ was once one of the notable examples . . . . The energy crisis has brought the mob out in full force. We now have coal equipment theft, tax-shelter schemes, schemes for shortweighting customers or beating environmental control law. *** In the New York City area, 200,000 gallons of gasoline are disappearing every week. *** Organized crime may let the outsider, legitimate or otherwise, find out where the growth areas are, but it moves in when the potential is proved. That's what it did with pornography and the stolen auto-parts business and cigarette bootlegging. It's moving now into electronic games. . . .
>
> West Coast organized crime has been moving into auto dealerships, into seafood distribution, into trucking, meatpacking, and the garment business. In Houston and elsewhere, they're showing up in the nursing home industry. They are innovative, opportunistic and as fast-moving as any hotshot acquisitions man.
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> *Forbes,* p. 62.

16. The ABA's argument in favor of activity "characteristic of organized crime" proceeds on the theory that while the §1961(5) definition of "pattern" only requires proof of two racketeering activities, it leaves room for courts to require more, thus giving the judiciary some basis upon which to differentiate conduct committed in a "fashion one would expect of true racketeers" in contrast to conduct which "show[s] little more than a garden variety misstatement of

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on a paraphrase of "Justice Stewart's famous comment on the problem of defining 'hard core pornography,' " *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion) "that '[c]ourts recognize a racketeering enterprise when they see it,' " and suggesting that the finder of fact should likewise be able to determine whether the acts alleged "were of such a nature as to be characteristic of organized crime." (*Amicus* Brief at 11-12)[17] In communities or industries where racketeering activity is the norm, *see e.g.*, *The Invisible Enterprise*, relying on "contemporary community standards" would simply insulate perpetrators. The more egregious and pervasive the conduct, the less the chance of recovery.

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fact communicated through the mails in the course of an ordinary business transaction." (Brief at 9, footnote omitted) Unfortunately, as the *Forbes* article indicates, "true racketeers" often engage in practices which are not easily differentiated from "garden-variety fraud" which term includes bribery, coercion, extortion and conspiracy, the mainstays of "white collar crime." Moreover, ABA's argument that §1961 defines the "minimum" proscribed conduct relies on an inapt analogy. The ABA argues that a similar definitional problem arose in limiting the ability of national banks to establish branches where 12 U.S.C. §36(f) provided "that the term 'branch' 'shall be held to include any . . . branch place of . . . business at which deposits are received, or checks paid, or money lent. . . . This Court . . . has held that the performance of the three listed functions, or any of them,' was the '*minimum* content of the term "branch" . . . . [I]t may include more.' *First National Bank in Plant City* [v. *Dickinson*], 396 U.S. 122, 135 (1969) (emphasis supplied)." This argument cuts against ABA's position by suggesting not that the statutory provisions alone are insufficient but that conduct not *explicitly* proscribed by §1961(1) may constitute racketeering activity.

17. "We already expect fact finders to determine what are contemporary community standards, and what is patently offensive under those standards. It cannot be any less reasonable to ask that a fact finder determine whether a particular activity so far exceeds the community norm for doing business as to be classified as a racketeering activity rather than as a simple garden variety fraud."

Amicus Brief at 12-13.

C. The Person/Enterprise Distinction And Entity Responsibility For Agents' Acts

Amicus next attempts to deal with the relationship between the defendant accused of engaging in a pattern of racketeering activity (the "statutory person" under §1962) and the "enterprise" whose affairs that person conducts or participates in, directly or indirectly, 18 U.S.C. §1962(c), and with the implications this distinction has on issues of liability. *Amicus* argues that §1962(c) requires separate entities and that under a configuration where the "statutory person" and the "statutory enterprise" are a single entity, the "statutory 'enterprise' . . . cannot be sued for damages." (*Amicus* Brief at 15). As previously noted, this statement confuses the person/enterprise problem with the issue of liability of the responsible party. (See pp. 8-12, *supra*)

Amicus posits its view on a model wherein the wrongdoer, "the statutory 'person[,]' is the analogue of organized crime, while the statutory 'enterprise' is the infiltrated business, victimized by . . . the 'person' whose activities Congress was aiming to deter and punish," (*Amicus* Brief at 16). This model, however, does not present any problem of statutory analysis because the victim enterprise and the "statutory person" are different entities. Under such facts, the enterprise would normally be the *plaintiff* seeking money damages, and not a party-defendant in a civil RICO action (unless it declined to sue and was, therefore, brought in by other injured parties as a nominal defendant in an appropriate case).

The separate-entity problem arises where the enterprise is the *instrumentality* or *perpetrator* and therefore the statutory person which has engaged in the pattern of racketeering activity. In that case, the person accused of committing the predicate offenses is the enterprise, and the argument is that the enterprise cannot "employ" or "associate with" *itself*. *Amicus'* analysis appears to throw into question whether, under this configuration, a perpetrator enterprise can be made to respond in RICO damages.

In *Haroco,* the Seventh Circuit sustained the complaint against defendant Heller International, ANB's holding company, reasoning that:

> plaintiffs here and the court in [*United States* v. *Hartley,* 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983)] are correct when they argue that the corporate enterprise should be liable where it is the perpetrator, or the central figure in the criminal scheme. In that situation, the corporate deep pocket should certainly be subject to RICO liability. At the same time, the defendants here and Judge Shadur in *Parnes* [v. *Heinhold Commodities Inc.,* 548 F. Supp. 20, 23-24 (N.D. Ill. 1982)] are surely correct in saying that the corporate enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others.

747 F.2d at 401. While the Seventh Circuit attempted to resolve the person/enterprise issue by noting that §1962(a) did not bear the same linguistic constraints as §1962(c), it also noted the availability of pleading alternatives which satisfy the separate entity requirement of §1962(c) and hold a perpetrator enterprise liable. Specifically, the Seventh Circuit noted; "Count I . . . alleges that ANB

violated section 1962(c) by conducting through a pattern of racketeering activity the affairs of its parent corporation, Heller International," *id.* at 402, and that it was "virtually self-evident that a subsidiary acts on behalf, and thus conducts the affairs, of its parent corporation." 747 F.2d at 402-403. (footnote omitted) *Amicus* first argues that the parent-subsidiary relationship is a neutral fact, and that a court should not hold the parent for acts of the subsidiary unless the evidence showed "some meaningful domination by one of those entities [the "person"] over the affairs of the other [the "enterprise"] in such a way as to cause the other to commit illegal activity." Without noting the logical conflict, *amicus* then shifts gears and attempts to apply this Court's analysis in *Copperweld Corp.* v. *Independence Tube Corp.,* 104 S.Ct. 2731 (1984), holding parents and subsidiaries incapable of conspiring with one another for purposes of Section 1 of the Sherman Act, 15 U.S.C. §1, to the issue of corporate responsibility for the acts of its agents. *Amicus* correctly cites *Copperweld* for the proposition that

> [a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one [,]

104 S.Ct. at 2742, but draws the wrong conclusion, suggesting that because of the unity of interest between the corporation and its subsidiaries, their relationship cannot satisfy the person/enterprise distinction. *Copperweld* proceeded on the theory that intracorporate conspiracy could not be made out under Sherman 1 because the statute required "two or more entities that previously pursued their own

interests separately . . . combining to act as one for their common benefit[,]'' *id.* at 2741, which the common interests of parent-subsidiaries defeated. As *Haroco* noted, this accommodation of divergent interests has no relevance to RICO concerns. ''[T]he Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' '' 747 F.2d at 403, n.22, *citing Copperweld,* 104 S.Ct. at 2740. Whether persons and enterprises had independent or identical goals before they engaged in conduct constituting RICO violations has no bearing in determining RICO culpability.

We submit that the unity of interest between a corporation and its subsidiaries bolsters rather than undermines the relationship expressed by the terms ''employed by'' or ''associated with'' and serves as the very basis for liability. Differently expressed, corporations are liable for the wrongful conduct of their agents, whether those agents are individuals employed by the parent or subsidiary entities, under the doctrine of *respondeat superior.*[18]

> A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior. But criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation.

United States v. *Cincotta,* 689 F.2d 238, 241-42 (1st Cir.), *cert. denied,* 459 U.S. 991 (1982), *cited in In re Olympia*

18. See Note, *Developments in the Law: Corporate Crime—Regulating Corporate Criminal Behavior through Criminal Sanctions,* 92 Harvard L. Rev. 1227 (1979); *Commonwealth of Massachusetts* v. *Beneficial Finance Co.,* 360 Mass. 188, 275 N.E.2d 33 (1971).

Brewing Co. Securities Litigation, (No. 77 C 1206 N.D. Ill. Dec. 18, 1984), *slip op.* at 29-30. There is no

> reason why federal law of corporate criminal liability . . . should not also apply to liability under RICO. . . . When the racketeering activity constitutes a fraud on or otherwise injures the corporation sought to be held liable, . . . an intent to benefit the master . . . would be wholly lacking in a case where the agent is stealing or otherwise hurting the master.

Id. at 31. *Accord, Haroco,* 747 F.2d at 401, *citing* Blakey, Bennett v. Berg: *The RICO Civil Fraud Action in Context, supra,* 58 Notre Dame L. Rev. at 307-25, for his discussion of RICO enterprise as ''victim, prize, instrument or perpetrator.'' Under the doctrine of *respondeat superior,* in cases involving an enterprise perpetrator, it would appear appropriate to allege that individuals who act as the enterprise's agents are statutory persons, that such enterprise is the statutory enterprise and to name *both* the individuals and the enterprise as defendants. This analysis is not complicated by the parent-subsidiary relationship, which is simply a form of associated entities, all of which act only through individuals. When properly distinguished, concepts of §1962 enterprise corruption may be liberally construed without improperly imposing enterprise liability or creating loopholes through which culpable parties avoid imposition of RICO remedies.

Conclusion

RICO is a potent weapon in the fight against criminal infiltration of the economy. The breadth of its provisions should be honored by this Court. Attempts to narrow RICO's scope in a manner that would exclude recovery in

proper cases should not be adopted on the ground that a broader interpretation also permits recovery in arguably questionable cases. This Court should affirm the holding below.

Respectfully submitted,

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APPENDIX

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §§ 1961-1964 (1978) (RICO)

(relevant portions reprinted herein)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of il-

legal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal

law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . .

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an un-

lawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest

subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interestate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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No. 84-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

REPLY BRIEF

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Respondents.

REPLY BRIEF

ARGUMENT

A. Respondents And Amici Attempt To Rebut Arguments Petitioners Do Not Assert

Although the Respondents and Amici[1] assert a host of purported reasons why Petitioners' position should not be

1. Amicus curiae briefs were filed on behalf of: (1) the States of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming ("States"); (2) County

(Footnote continued on following page)

adopted by this Court, most of them are simply not germane to arguments made by Petitioners, and accordingly need not and will not be addressed.[2] However, to avoid confusion regarding the arguments Petitioners have made, Petitioners will identify the arguments which Respondents and Amici erroneously attribute to them.[3]

(footnote 1 continued)

of Suffolk, New York ("County"); (3) Cities of Chicago, New York and Philadelphia ("Cities"); (4) State of New York ("New York"). In addition, motions for leave to file briefs were filed by John Grado ("Grado") and The Interinsurance Exchange of the Automobile Club of Southern California ("Interinsurance") to which Petitioners have objected but which had not been ruled upon at the time of this Brief's printing.

In support of Petitioners an amicus brief was filed by the American Bankers Association. Further, the following have filed motions to file Amici briefs in *Sedima* in support of the respondents in that case, who take a position similar but not identical to that of Petitioners in this case: (1) The American Institute Of Certified Public Accountants; (2) The Securities Industry Association; and (3) The Alliance Of American Insurers, The American Council Of Life Insurance, The American Insurance Association, The National Association Of Independent Insurers, and State Farm Insurance Companies.

2. Those arguments which do pertain to Petitioners' position are discussed in Sections B and C, *infra*.

3. Respondents' contrived claim that Petitioners' argument is not properly before this Court is totally baseless. A review of the Petition For Certiorari and the question presented readily reveals that Section 1964(c) cannot be interpreted absent an interpretation of Section 1962. (Petition, pp. 7-10). Interpreting only the "by reason of" clause in Section 1964(c) and not "by reason of a violation of section 1962" as Respondents suggest, is fanciful. Likewise, a review of the record in the Seventh Circuit demonstrates that Petitioners' argument, both below and in this Court, is directed to interpreting the statutorily prescribed injury for which RICO's civil remedies are available. (747 F.2d 384, 386, 392-399; App. A-4, A-17 to A-30). That interpretation, by definition, includes an understanding of the substantive RICO violation without which there is no injury entitling a plaintiff to civil damages.

First, almost without exception, the briefs filed in opposition to Petitioners assail the Second Circuit's analysis in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657). (Respondents Brief, pp. 16-18; States Brief, p. 9; Grado Brief, pp. 10-11; Cities Brief, p. 5; County Brief, p. 10; Interinsurance Brief, p. 8). Yet, Petitioners do not subscribe to the *Bankers Trust* court's position that the injury from the predicate acts must always be different from an injury resulting from the pattern of racketeering activity.[4] *See* initial Petitioners' Brief, p. 29. Nor is any aspect of the Petitioners' argument dependent upon the *Bankers Trust* analysis.

Second, Petitioners do not claim that a competitive injury must be suffered in order to recover under civil RICO. Nonetheless, Respondents and Amici States and Grado criticize the so-called competitive injury argument. (Respondents Brief, pp. 19-20; States Brief, p. 7; Grado Brief, pp. 7-8).

Third, notwithstanding Respondents' erroneous suggestion, Petitioners do not contend that the enterprise must benefit from or further its business as a result of the racketeering activity in order to be liable under RICO. (Respondents Brief, p. 13; New York Brief, p. 9).

Fourth, despite Petitioners never having asserted an argument requiring an "organized crime" link of any kind, the deficiencies of such an argument are addressed by the Respondents and several Amici. (Respondents Brief, pp. 21-25; Grado Brief, pp. 6-7; States Brief, p. 6).

Finally, even though Petitioners expressly disclaim reliance on the so-called garden-variety fraud argument[5]—i.e.,

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4. Petitioners also part company on this issue with amicus American Bankers Association ("ABA") which filed a brief in support of Petitioners since, unlike the Petitioners, the ABA endorsed the *Bankers Trust* holding. (ABA Brief, p. 4).

5. *See* Petitioners' initial Brief, p. 25.

that the federalizing of all garden-variety state fraud cases should not be permitted—Amici included a discussion of that argument in their briefs. (States Brief, pp. 10-11; County Brief, p. 9).

What is perhaps most telling about all the briefs opposing Petitioners is their conspicuous failure to confront, let alone refute, the validity of the Petitioners' essential argument that the plain meaning of the statute requires a civil RICO plaintiff to allege and ultimately prove that the alleged predicate offenses were integrally related to the management of the enterprise's affairs. Respondents, for example, devote less than two pages of their entire brief to the Seventh Circuit's decision (Respondents Brief, pp. 26-27) but devote eleven pages to the District Court decision which it reversed (Respondents Brief, pp. 15-26). In like manner, the only responsive discussion of Petitioners' argument found in the States' twenty-seven page brief is contained in a footnote (States Brief, p. 12, n.12). The position of the New York Amicus is totally incongruous. In its brief in the *Sedima* case, New York expressly criticized *Haroco* for not requiring "injury" from *all* of the elements of a RICO violation. (*Sedima* New York Brief, p. 20). Now, in its brief in *Haroco*, New York turns 180 degrees and endorses the *Haroco* holding.[6]

The reason that Respondents and Amici go to such lengths to misstate Petitioners' position or avoid confronting Petitioners' statutory construction is obvious. The soundness in the Petitioners' position is that it is consistent with and

6. The intellectual inconsistency and shifting support and opposition based upon whatever best serves its individual interest is also evidenced by the Amici' repeated attempts to inject RICO issues of interest to them but not before the Court in this case. For example, the person-enterprise issue and the issue of whether private equitable relief is available are not remotely related to the issue on which this Court granted certiorari. (States Brief, p. 5, n.9, p. 13, n.13).

promotes the language, purpose and legislative history of this statute, not one side or the other of the judicially polarized issue which the Court addresses in this case.

B. Petitioners Do Not Contend That Only "Managers" Can Violate RICO

Unable to openly confront Petitioners approach to construing the plain meaning of Section 1962(c), Respondents misstate the construction which Petitioners urge this Court to adopt, as follows:

> Petitioners' argument that there is no RICO violation unless the person committing the crimes "managed" the enterprise, would read Section 1962(c) as though it provided: any person who "manages or directs the affairs of an enterprise".

(Respondents Brief, p. 6). Respondents' quotation from *Russello v. United States*, 104 S.Ct. 296, 300 (1983), "the short answer is that Congress did not write the statute that way," decisively responds to Respondents' mischaracterization of Petitioners' argument but not to their actual argument. The short answer to Respondents' assertion is that Petitioners do not contend that only managers can violate RICO.

Rather, Petitioners contend that there must be a nexus between the commission of the underlying predicate offenses and the management of the enterprise's affairs. Or, stated differently, the pattern of racketeering must be integrally related to the enterprise's affairs. This construction fully satisfies the language's plain meaning and is consistent with the statute's purpose and legislative history. Applying this construction, a manager who is directing an enterprise's affairs through the means of the predicate offenses most certainly violates Section 1962(c). However, so would a non-managerial employee who participates in the predicate acts which are the means by which the enterprise's affairs are being managed.

Contrary to Respondents' suggestion, the statutory terms "employed by," "associated with," "participate," and "directly and indirectly" are not overlooked by Petitioners. (Respondents Brief, p. 6). Rather, it is Respondents who ignore that Section 1962(c) uses the term "conduct" twice, first as a verb and then as a noun:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to *conduct* or participate, directly or indirectly, in the *conduct* of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1962(c) (emphasis added). It is the second use of the word "conduct," as a noun, to which "participate" and "directly or indirectly" relate. Unquestionably, one can participate in the management of or the direction of the enterprise's course of affairs without being a "manager." Likewise, that participation can be direct or indirect. Thus, all of the terms used in the statute are given significance under the Petitioners' construction of conduct as both a verb and a noun.

In contrast, Respondents' suggested reading of "conduct" as meaning "any degree of participation" can only apply to "conduct," used as a verb, not as a noun. (Respondents Brief, pp. 7-8). Simply put, it would be inane and redundant to prohibit participation in any "degree of participation of the enterprise's affairs." Similarly, the interpretation offered by Amicus Interinsurance, "the notion of execution or carrying out of tasks," (Interinsurance Brief, p. 14) can only apply to the first "conduct." Otherwise, the Section would be interpreted as prohibiting the " 'carrying out of tasks' or participating in the 'carrying out of tasks.' " If all that is required is participation or carrying out of tasks in the enterprise's affairs through a pattern of racketeering activity, the second use of the word "conduct" as a noun is superfluous and duplicative of the phrase "of such enterprise's affairs." Such a construction is, of

course, contrary to the fundamental rule of statutory construction that each clause and word should be given effect in a common sense fashion. *See generally* 2A Sands, *Sutherland Statutory Construction*, §46.06.

Hence, by employing the concept of management as the usual and ordinary meaning of "conduct," the second use of the word "conduct" as a noun serves a logical purpose in the clause—one which requires that the pattern of racketeering activity be integrally related to the enterprise's affairs or the means by which the affairs of the enterprise are managed. Thus, by defining "conduct," to include the concept of management, each meaning of "conduct" in Section 1962(c) can be defined harmoniously[7] to serve the statutory purpose.

In sum, and contrary to Respondents' claim, Petitioners' construction of Section 1962(c) will not "insulate those low level criminals who most frequently commit RICO's predicate offenses." (Respondents Brief, p. 3). A person is not immune to a civil RICO claim merely because he is not in a position of management or authority. If the racketeering activities in which a nonmanagerial person participates are the means by which the enterprise is being managed, he could nevertheless be subject to a civil RICO claim.[8]

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7. The same term should not be construed differently within the same statute. *See* 2A Sands, *Sutherland Statutory Construction* §46.06. *See, e.g., Director, Office of Workers' Compensation Programs, United States Department of Labor v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107-08 (7th Cir. 1981); *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978).

8. Petitioners submit that, because the alleged predicate acts (mail fraud in connection with ANB's definition of prime rate) are not alleged to relate to the management of ANB's or Heller's affairs and because Grayheck is not alleged to have managed or directed ANB's affairs by virtue of the alleged fraudulent prime rates, the District Court's dismissal of the Complaint should be sustained. Respondents, in contrast, contend that even if Petitioners prevail as

(Footnote continued on following page)

C. Petitioners' Construction Of Section 1964(c) And 1962(c) Will Not Undermine Criminal RICO Prosecutions Or Legitimate State Amici Interests

Respondents and Amici alike suggest *in terrorem* that a multitude of untoward effects on criminal RICO prosecutions will result if Petitioners' position is adopted by this Court, including: (a) the creation of an insurmountable burden imposed on prosecutors to prove the integral relationship of the predicate acts to the management of the enterprise's affairs (Respondents Brief, pp. 10-11); (b) the exoneration of persons previously subject to criminal RICO violations (Respondents Brief, p. 13; Interinsurance Brief, p. 17); (c) "eliminat[ing] the attack on organized criminal behavior accomplished by §1962(c)" (Grado Brief, p. 24); and (d) the exemption of bribery and "looting [of] an enterprise from within" as violations of Section 1962(c) (Respondents Brief, p. 12). It is for these and related reasons, they argue, that lower courts have rejected the "integral relationship" nexus between the predicate acts and the management of the enterprise's affairs in the criminal RICO setting.[9]

This parade of imaginary horribles is precisely that—imaginary. To the extent RICO has been violated, Respondents' so-called "quantitative and qualitative assessment of

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(footnote 8 continued)

to the meaning of Section 1962(c), their pleading is sufficient to withstand a motion to dismiss.

The issue presented to this Court, however, is one of statutory construction regarding the meaning of Section 1964, and by necessity Section 1962, and thus, this dispute as to Respondents' particular allegations need not be resolved by this Court. Instead, upon clarifying the meaning and scope of the type of injury required to be pleaded under Section 1964, a remand is appropriate to allow the District Court to determine, in light of this Court's opinion, whether the Complaint alleges a sufficient injury.

9. *See* Respondents Brief, pp. 13-14; Interinsurance Brief, p. 13; States Brief, p. 12.

both the person's racketeering participation and the enterprise's other . . . activities," for example, does not impose the onerous burden Respondents depict (Respondents Brief, p. 11). Indeed, such an assessment is necessarily required in order to invoke Section 1963, the criminal forfeiture RICO provision, since it is only the defendant's interest in the enterprise which is subject to forfeiture, and not the entire enterprise. 18 U.S.C. §1963. *See, e.g., United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 957 and 105 S.Ct. 1192 (1985); *United States v. Zang*, 703 F.2d 1186, 1193-1194 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 103 (1983).

Absent the objective of forfeiture, a criminal RICO prosecution is pointless since the substantive criminal statutes with which to prosecute the offender for the predicate acts are readily effective and nothing is gained by including a RICO violation in the indictment. Hence, the Department of Justice Guidelines advise Government attorneys against adding a RICO count which merely duplicates a traditional criminal offense "unless it serves some special RICO purpose . . . [or] attack[s] the activity which Congress most directly addressed—the infiltration of organized crime into the nation's economy." Trade Reg. Rep. (CCH) ¶50,452 (Sept. 6, 1983).

Similarly, the Government's ability to prosecute "inside looters" or embezzlers for RICO will not be diminished by requiring the integral relationship between the management of enterprise's affairs and the predicate acts. Respondents' contention to the contrary is premised on the misapprehension that Section 1962(c) is not directed to the economic infiltration of enterprises by organized crime. (Respondents Brief, p. 11). It is no accident that Respondents fail to cite any authority in support of their proposition. Indeed, even the Amici do not dispute that RICO's objective was to eradicate and deter economic infiltration or penetration of businesses. (*See* Grado Brief, p. 16; Cities Brief, p. 7; States Brief, p. 12). Embezzlement by a sole employee, therefore,

unrelated to some larger scheme to take over the business, is simply not within the scope of what Congress intended when it enacted RICO. That conclusion, however, leaves fully intact both the substantial civil and criminal remedies which the victim or the Government can employ under state or federal embezzlement statutes. *See* Pub. L. No. 91-452, 84 Stat. 947 (1970).

Moreover, except for a single employee's embezzlement unrelated to a larger plan, a RICO prosecution would still be available even if the predicate acts are not related to the management of the corporation. RICO's "enterprise" requirement can be fulfilled by a de facto or surrogate enterprise instead of the victim corporation.[10] And as to that enterprise, which would include for example the participants scheming to loot the company, the individual predicate acts of embezzlement would, in fact, be integrally related to the management of the de facto enterprises.[11]

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10. *See, e.g., United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). *See also United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Mazzei*, 700 F.2d 85, 88 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

11. Respondents' purported examples of the "Government's recent successes" in using RICO in a criminal context which would not have been possible under Petitioners' construction, *United States v. Kovic*, 684 F.2d 512 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982); *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), do not support their position. (Respondents Brief, p. 13, n.14). Rather, in both instances, the evidence was such that the predicate acts were very closely related to the management of the relevant enterprises, i.e., the Sheriff's Office in *Welch* and the Police Department in *Kovic*. Apparently, Respondents confuse the concept of "integrally related to the management of the enterprise's affairs" with providing a benefit to the enterprise. Further, in both *Kovic* and *Welch*, the prosecution could have alleged a de facto enterprise to satisfy the enterprise element since neither Kovic nor Welch acted alone.

Further, the professed concern in the States' Amici Brief, on behalf of thirty-four states, that federal decisions are being used to challenge state RICO statutes, (States Brief, p. 2) does not withstand scrutiny. Indeed, only twenty-two of the thirty-four states joining in the brief have enacted RICO statutes. (States Brief, p. 2). Moreover, most of the states with a RICO statute have significantly not adopted the federal statute verbatim. *See, e.g.*, ABA, *A Survey On Racketeer Influenced And Corrupt Organizations (RICO) Laws* (1983). Rather, a provision which frequently varies in the state RICO statutes from the federal counterpart is the civil remedy. Illustrative is Arizona's RICO statute, one of the first state RICO statutes which provides:

> A person who *sustains injury* to his person, business or property *by racketeering as defined by §13-2301, subsection D, paragraph 4* . . . may file an action in superior court for the recovery of treble damages . . .

Ariz. Rev. Stat. §13-2314 (emphasis added). Section 13-2301, subsection D, paragraph 4, Arizona's equivalent of federal Section 1961, defines "racketeering" as any act involving an enumerated list of underlying predicate offenses. Thus, in marked contrast to Section 1964 of the federal statute, which requires an injury by reason of Section 1962[12] not Section 1961, the comparable state RICO statute requires only that injury be caused by the predicate acts, the same position taken by the Seventh Circuit, Respondents, and Amici.[13] *See*

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12. Arizona's corresponding substantive RICO provision is Section 13-2312 which provides, in pertinent part, as follows:

> A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering.

Ariz. Rev. Stat. §13-2312.

13. It is also noteworthy that Professor G. Robert Blakey assisted the Arizona State Legislature in drafting its RICO statute.

(Footnote continued on following page)

also Idaho Code §18-7805; N.M. Stat. §30-42-6; Utah Code §76-10-1605(1).

The Amici, States, New York, and Interinsurance also claim that Petitioners' "integral relationship" test should be rejected because similar arguments have been rejected by the courts of appeals. (States Brief, p. 12; Interinsurance Brief, p. 13; New York Brief, pp. 8-10). While some courts have apparently indicated that a lesser relationship between the enterprise and the predicate acts will suffice,[14] others have adopted Petitioners' position. *See, e.g., Bennett v. Berg,* 710 F.2d 1361, 1364 (8th Cir.), *cert. denied,* 104 S.Ct. 527 (1983) ("A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself."); *United States v. Mandel,* 591 F.2d 1347, 1375, *aff'd en banc,* 602 F.2d 653 (4th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980) (" 'conduct or participate' language in §1962(c) required some involvement in the operation or management of the business");[15] *United States v.*

(footnote 13 continued)

See Blakey, *Materials On Rico: Criminal Overview,* Cornell Institute On Organized Crime, vol. 1, p. 5 (1980). If anyone, Professor Blakey, who is also credited with assisting in the preparation of the States' Brief, knows that the *in terrorem* argument as to the effect on state RICO statutes is without merit.

14. *See e.g., United States v. Stofsky,* 409 F.Supp. 609, 613 (S.D. N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

15. Aware of the Eighth and Fourth Circuits' disagreement with the Second and Fifth Circuits' position, Amici Interinsurance attempts to dilute the strength of the *Bennett* and *Mandel* decisions by suggesting that the en banc per curiam opinion in *Mandel,* 602 F.2d 653 (4th Cir. 1979), changed the holding on the requisite nexus of Section 1962(c). (Interinsurance Brief, p. 12, n.11). This is not accurate. The en banc per curiam opinion simply affirmed all convictions. The discussion of the Section 1962(c) nexus, however, occurred with respect to the acquittal on Count 23. 591 F. Supp. 1374-1376.

Dennis, 458 F.Supp. 197, 199 (E.D.Mo. 1978) ("The mere fact that defendant is employed by the enterprise and collects unlawful debts on the premises of the enterprise . . . does not establish that the defendant participated in the conduct of the enterprise's affairs through the collection of the debts.").

Moreover, none of the decisions offered by the Amici have arisen in a context in which the court was squarely faced with the task of defining the requisite degree of relationship, as is this Court. Rather, those decisions arose in contexts in which the RICO statute was asserted to be unconstitutionally vague,[16] or which involved a conspiracy,[17] or where, because of the particular facts, it was unnecessary to decide the degree of relationship required.[18] Indeed, in one of the most recent cases marshalling the decisions on this point, the Fifth Circuit emphasized that it had not previously formulated a test to determine when the requisite nexus between the enterprise and the racketeering activity had been satisfied. *United States v. Cauble,* 706 F.2d 1322, 1332 (5th Cir. 1983), *cert. denied,* 104 S.Ct. 996 (1984). *Accord United States v. Carter,* 721 F.2d 1514, 1527 (11th Cir.), *cert. denied,* 105 S.Ct. 89 (1984).

A review of the lower court decisions on this point displays a profound lack of consistency among or within the Circuits and affords no facile solution to the issue before this Court.[19] The one pervasive holding in those cases, however,

16. *See, e.g., United States v. Stofsky,* 409 F.Supp. 609, 613 (S.D. N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976).

17. *See, e.g., United States v. Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978).

18. *See, e.g., United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

19. *Compare United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981) and *United States v. Cauble,*

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is that RICO prohibits conducting an enterprise *through* a pattern of racketeering activity and not simply the acts of racketeering themselves. *United States v. Cauble*, 706 F.2d 1322, 1332 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 996 (1984), ("[T]here must be a nexus between the enterprise, the defendant, and the pattern of racketeering activity."); *United States v. Nerone*, 563 F.2d 836, 851-852 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978), (Government's case failed when Government did not attach significance to the use of the word "through" contained in the statute and accordingly did not prove the connection between the racketeering activities and the affairs of the enterprise).

Respondents, however, conclude that "[t]he only necessary nexus between the racketeering activities and the enterprise's affairs is that the predicate acts take place in the course of the offender's participation in the enterprise." (Respondents Brief, pp. 12-13). Superficially, Respondents' description of the requisite nexus might be an accurate paraphrase of Section 1962(c) but for their disingenuous omission of the word "conduct." To put back in what Respondents improperly leave out, Respondents conclusion would correctly require "that the predicate acts take place in the course of the offender's participation in the *conduct* of the enterprise." Respondents' elision notwithstanding, the word cannot be lifted from the statute.

Ironically, Respondents charge that Petitioners' interpretation of Section 1962(c) is "backwards." (Respondents Brief, p. 13). But, in the very next sentence in their Brief, Respondents unqualifiedly state that "RICO applies where

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(footnote 19 continued)

706 F.2d 1322, 1333 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 996 (1984) *with Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1984) and *United States v. Mandel*, 591 F.2d 1347, 1375-1376, *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). *See also United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir.), *cert. denied*, 105 S.Ct. 89 (1984).

the enterprise is the means by which the person engaged in the racketeering activity." (Respondents Brief, p. 13). The statute's language, however, simply cannot be reconciled with that statement. Rather, RICO applies where the racketeering acts are the means by which the enterprise's affairs are conducted according to the language of the statute.

D. Respondents And Amici Fail To Refute Petitioners' Actual Argument Regarding The Statutorily Prescribed RICO Injury

RICO is undeniably a controversial statute among the bar, bench, academia, private interest groups and the business community at large, concerning as it does organized crime, treble damages, and the federalization of heretofore common law state claims. That controversial nature has apparently caused courts, including the *Sedima* and *Haroco* courts, to lose sight of basic statutory construction rules. Objectively applied to Section 1964, however, those rules dictate a result which is uncomplicated, intelligible, workable, and consistent with the objectives sought to be achieved by Congress.

Following this Court's established rules of statutory construction, the plain meaning of the relevant statutory language is first considered; next, the legislative history is examined; and finally, consideration is given to any policy consideration in favor of a less literal reading of the statute. *Mohasco Corp. v. Silver*, 447 U.S. 807, 815 (1980).

Section 1964 unequivocally affords a civil remedy to persons damaged "by reason of a violation of section 1962." Section 1962, in turn, specifies the three categories of activities which are prohibited, and if performed, will constitute a "violation of Section 1962." The category delineated in Section 1962(c) prohibits anyone associated with an enterprise from conducting, or participating in the conduct of the enterprise's affairs through a pattern of racketeering activity. Defining Section 1962(c)'s words by reference to the statu-

tory definitions or, in the absence thereof, by using the usual and common sense dictionary definitions in order to give effect to each word results in a construction that: Section 1962(c) is violated when a person associated with an enterprise commits two or more of the predicate acts and those predicate acts are the means by which the enterprise's affairs are being managed, or integrally related thereto. Any other interpretation of Section 1962(c) can only be achieved if one or more words of the statute is rendered superfluous or meaningless or given an unconventional meaning.

RICO's legislative history, although expansive with respect to many of its provisions and its overriding purpose, particularly those of a criminal nature, is nonexistent with respect to the particular questions presented in this case. On the other hand, there is not "a clearly expressed" contrary legislative intent to warrant reconsideration of the plain meaning of the statutory language.[20] Congress' purpose was to provide a weapon with which to fight "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong. 1st Sess. 76 (1969). *See also Russello v. United States*, 104 S.Ct. 296, 303 (1983); *United States v. Turkette*, 452 U.S. 576, 591 (1981). Petitioners' construction of Section 1962(c)'s plain meaning unquestionably affirms that purpose. If the racketeering activity is not integrally linked to the management of the enterprise's affairs, the danger of infiltration is not present. Further, to the extent the racketeering acts are not related to the management of the enterprise, prior existing state and federal statutes remain an effective arsenal with which to combat the unlawful acts.

Finally, no reason has been suggested either by the Seventh Circuit, the Respondents or the Amici, to justify an interpretation other than the plain meaning of Sections

20. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

1964 and 1962. The Seventh Circuit's test of proximate causality to the predicate acts, but not the substantive violation of Section 1962(c), effectively emasculates the substantive RICO provision for purposes of civil RICO claims and expands the scope of RICO beyond what is required to realize its objectives. Moreover, the entire meaning and purpose of RICO is perverted when predicate offenses that happen to be committed in a business setting, as alleged in this case, are alchemized into federal claims for treble damages and attorneys fees.

Petitioners' construction of Section 1962(c)—that a violation occurs when a person commits or participates in the commission of predicate acts which are integrally related to the management of the enterprise's affairs—is not, of course, a scientific measuring device that will rotely measure the presence or absence of prohibited substance. It is, however, a workable and definitive standard to provide federal courts with the necessary factors to apply to particular facts presented on a case-by-case basis. To reject this construction because it does not provide absolute contours which, in myriad fact patterns will foreordain RICO's applicability, makes little sense in light of the inimical alternatives which unduly expand or restrict RICO's scope.

Accordingly, this Court should construe Section 1964 to require a civil RICO claimant to allege injury by reason of a violation of Section 1962. In turn, Section 1962 can only be construed to require the defendant to have acquired, maintained control or an interest in, or conducted the affairs of an enterprise through the commission of the statutorily prescribed offenses. In particular, if a defendant is charged with having conducted or participated in the conduct of the affairs of an enterprise through the offenses under Section 1962(c), those offenses must be integrally related to the management of the enterprise's affairs. Absent such a nexus, a violation of the underlying offenses may have occurred but a RICO violation has not.

CONCLUSION

The Order of the Court of Appeals for the Seventh Circuit should be reversed and the District Court's Order affirmed, dismissing the Respondents' Amended Complaint for failure to state a claim upon which relief can be granted.

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